In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-406

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California) respectfully pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1977.[1]

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A. The declaratory order of the Federal Communications Commission (FCC) in *American Telephone & Telegraph Company,* Docket No. FCC 75-1146, adopted October 9, 1975, and released October 16, 1975, 56 FCC 2d 14 (1975), is printed in Appendix B.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1977. The jurisdiction of this Court is invoked under 28 USC Section 1254(1); Section 402(a) and 405(j) of the Communications Act of 1934 as amended (47 USC 402(a), 405(j)); and 28 USC 2341, 2344 and 2350.

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[1]The Public Utilities Commission of the State of California (hereafter "CPUC") is the agency in the State of California charged with the responsibility, *inter alia,* of regulating telecommunications offered to the public within the State of California. (California Constitution, Article XII, Sections 3 and 6; California Public Utilities Code, Sections 216, 233 and 234.) The General Counsel of the California Commission is authorized, under Section 307 of the California Public Utilities Code, to represent and appear for the People of the State of California and the California Commission in all actions and proceedings of this nature.

[2]The appendices cited herein are separately bound and are jointly submitted by these petitioners and by petitioner National Association of Regulatory Utility Commissioners.

QUESTION PRESENTED

Whether the FCC may by declaratory order, unsupported by an evidentiary record, eliminate Congressionally protected state regulation of intrastate private line telecommunications services rendered by specialized communications common carriers used both in interstate and intrastate communications, thereby inequitably burdening intrastate ratepayers, upon the asserted ground that it is technically and practically too difficult to separate the two classes of communications.

STATUTORY PROVISIONS

Involved are Sections 2(b), 3(e), 221(b) and 410 (c) of the Communications Act of 1934 as amended, 47 USC Sections 152(b), 153(e), 221(b), 410(c). These provisions are set forth in Appendix D.

STATEMENT OF THE CASE

This case arises out of the growing conflict between effective state economic regulation of intrastate communications expressly reserved to the states by the Communications Act of 1934, and the policy of the FCC to stimulate competition in interstate communications. In this case the FCC has not followed its own statute and has disregarded the clear intent of Congress. In affirming the FCC the court below has decided an important federal question in a way in conflict with applicable decisions of this Court. The

decision of the court below raises an important federal question of law which has not been, but should be, settled by this Court.

A. Technical Background

Private line service provides the large scale telephone customer with circuits dedicated to his use between locations specified by the customer. The customer has continuous communication without requiring the carrier to establish a new connection for each call or message.

A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through switches on a local telephone company's premises instead of through a PBX switch on the customer's premises. The private line circuits furnished in a CCSA are provided for the exclusive use of the CCSA customers. The switching machines are shared with other private line service customers.

Foreign exchange (FX) enables a business to maintain a local telephone at a distance from its office. An example of intrastate FX is a call originating in Los Angeles and terminating in the San Diego exchange as if the call had originated in San Diego. For a fixed monthly charge determined by the CPUC, San Diego dial tone is provided at the point of call origin in Los Angeles.

An example of an interstate FX call is a call originating in Chicago and terminating in San Diego with San Diego dial tone being provided at the point of origin in Chicago for a fixed monthly charge. In this case the charge is determined by the FCC.[3] (See *Bell System Tariff Offerings,* Decision No. 74-457 in Docket No. 19896, 46 FCC 2d 413 (1974) at 418 (fn. 5), and *Bell Telephone Company of Pennsylvania v. Federal Communications Commission,* 503 F.2d 1250 (3d Cir. 1974) at 1254 (fns. 3 and 4).)

B. Procedural History

1. Proceedings Before the CPUC

Southern Pacific Communications Company (SPCC) instituted interstate operations as a specialized communications common carrier (SCCC) between San Francisco, Los Angeles, Phoenix and Tucson in December 1973.[4] SPCC does not provide the full range of services contemplated by the Communications Act of 1934, 47 USC 151 *et seq.*

After various preliminary filings with and rulings by the CPUC, SPCC on October 31, 1974, filed Ap-

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[3]The FCC treats FX service as private line service. The CPUC treats FX service as a substitute for toll service.

Private line service is point to point service with both ends terminating on a single customer's premises. No exchange dial tone is provided. In foreign exchange service, dial tone of the distant exchange is provided at a single point.

Until the FCC order herein was issued these distinctions in rate treatment of FX service between state commission and the FCC marked the traditional line of separation between state and federal regulation of FX service.

[4]The SCCC class of communications common carriers came into being as the result of an FCC rulemaking docket in which the FCC decided to permit competition in providing specialized interstate voice and data communication services to the public. *Specialized Common Carrier Services,* Docket No. 18920. *Notice of Inquiry,* 24 FCC 2d 318 (1970); *First Report and Order,* 29 FCC 2d 870 (1971); reconsideration denied, 31 FCC 2d 1106 (1971); affirmed, *Washington Util. & Transp. Comm'n v. FCC,* 513 F.2d 1142 (9th Cir. 1975); cert. denied, 423 U.S. 836 (1975).

plication No. 55284 before the CPUC to provide intrastate private line specialized communications services. The application was filed "under protest," and in conjunction with a motion to dismiss it. The purpose of the application, without conceding the necessity for a certificate of public convenience and necessity, was to request such a certificate for intrastate operations, if the CPUC ruled that one was necessary.

The SPCC application was consolidated with a docket containing an application by The Pacific Telephone and Telegraph Corporation (PT&T) which was a competitive response to SPCC. The consolidated cases were heard during December 1974 and February 1975. On March 4, 1975, the CPUC issued an interim opinion in Decision No. 84167, which is printed in Appendix C.

Decision No. 84167 held that SPCC needed a certificate of public convenience and necessity from the CPUC to commence its proposed California intrastate service. A certificate was granted to establish intercity private line communications service for voice and data transmission between the cities of Bakersfield, Fresno, Los Angeles, Merced, San Francisco and Stockton including but limited to certain exchange areas. It was also held that interim rates should be set which would minimize rate differentials between PT&T and SPCC and encourage SPCC to concentrate upon expanding its business by offering innovative services to its potential customers, rather than by stressing large differences in rates.

The CPUC decided that this approach was necessary to prevent excessive diversion of revenues from public toll and private line services of the wire line utilities. Such control through proper rate and tariff regulation was held to be necessary to protect low density and exchange customers from the economic burden of making up the revenues foreseeably lost by the wire line utilities if wide rate disparities were permitted to exist between the wire line companies and the SCCC's.

Accordingly, the CPUC ordered that any tie line connections to PBX switchboards by SPCC should be arranged to prevent through calls from being made to or from the exchange network at either or both ends of the tie line circuit. Moreover, any direct connection to the exchange network of private line circuits, including any connection similar to foreign exchange (FX) service, was prohibited.[5]

In March 1975 SPCC placed an order with PT&T to connect the SPCC interstate private line circuit between Los Angeles and San Diego to the PT&T San Diego telephone exchange. On May 16, 1975, PT&T filed with the CPUC a Petition for Instructions with Respect to Decision No. 84167.

[5]Since 1924, 10 years before the Communications Act became law, the CPUC has considered intrastate FX service to be a substitute for toll service. As explained more fully in the excerpt from California Railroad Commission (now CPUC) Decision No. 14420, 25 C.R.C. 721, 761-63 (1924), in Appendix E hereto, this treatment of intrastate FX service is intended to preserve economic use of toll facilities and maintain toll revenue support for exchange service.

PT&T's petition stated that the connection requested by SPCC would require PT&T to provide the facilities and connections necessary to connect the SPCC San Diego-Los Angeles lines (1) at the southern end to PT&T's San Diego local exchange, and (2) at the Los Angeles end to PT&T central office switching machinery that would permit further connection to the American Airlines private line network. The particular arrangement requested would allow calling to San Diego but not from San Diego. San Diego foreign exchange service would be provided to a point in Los Angeles where it could be accessed by any telephone on the American Airlines network, including telephones in Los Angeles, at other points in California, and out-of-state points as well.[6] The petition asserted that the service requested was similar to a foreign exchange service, prohibited by Decision No. 84167. Accordingly, instructions were requested from the CPUC on how to deal with such requests.

On June 6, 1975, PT&T withdrew the Petition for Instructions and filed a complaint, alleging that service of the kind SPCC intended to provide has been regulated consistently by the CPUC as intrastate foreign exchange service and has not been treated as interstate private line service. PT&T also alleged that it had been informed by the Chief of the Common Carrier Bureau of the FCC that, in his opinion, PT&T was required to provide the connecting facilities requested by SPCC. Accordingly, the requested

[6]Appendix F hereto is a schematic of connections requested by SPCC.

facilities were connected under protest. Finally, PT&T alleged that SPCC intended to provide intrastate foreign exchange service between San Diego and other points within California contrary to the certificate granted by Decision No. 84167. It was alleged such service is within CPUC jurisdiction pursuant to Article XII of the California Constitution, the California Public Utilities Code, and Sections 2(b) and 221(b) of the Communications Act of 1934 (47 USC 152(b) and 221(b)).

2. Proceedings Before the FCC

About June 16, 1975, SPCC filed with the FCC a *Petition for Declaratory Rulings and for Enforcement of Cease and Desist Orders.*[7] The SPCC petition requested specific relief against PT&T and Southwestern Bell Telephone Company by a declaratory order enforcing a cease and desist order issued against the American Telephone and Telegraph Company (AT&T) and the Associated Bell System Companies in the FCC Docket, *Bell System Tariff Offerings,* Decision No. 74-457 in Docket No. 19896, 46 FCC 2d 413 (1974), affirmed *sub nom. Bell Tel. Co. of Pennsylvania v. FCC,* 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

The SPCC petition requested the FCC to issue a declaratory ruling that it has exclusive authority over

[7]It should be noted that SPCC did not attempt to test the validity of Decision No. 84167 by petitioning the CPUC to review its decision or petitioning the California Supreme Court for a writ of review. (Cal. Pub. Util. Code 1731, 1956.)

interconnection by SCCC's into the Bell System Companies' local exchange facilities for the purpose of furnishing interstate FX service or for insertion into Bell System Common Central Switching Arrangements (CCSA) to provide private line interstate service. The FCC was requested to declare specifically that the Bell System Companies must provide a CCSA or an FX interconnection at one end of a private line circuit between two points, whether or not the two points are located within a single state, whenever the other end is connected by a switch to a circuit in interstate service.

In July 1975 California filed with the FCC its *Comments by California in Opposition to the Petition for Declaratory Rulings by Southern Pacific Communications Company.* These comments pointed out that historically the type of private line connection requested has been prohibited in California. California stated that the requested connection is comparable to foreign exchange service, the rates for which are set in recognition of the toll revenue which would be lost and the resulting increase in the cost of exchange service to the ordinary citizen.

It was stated that the issues of fact in the California proceeding involved matters of substantial local concern and that SPCC was attempting to interpose a declaratory ruling by a federal agency so as to frustrate the local process which initially SPCC itself had affirmatively invoked. California urged that SPCC should be required to exhaust its remedies in the California forum before seeking federal intervention. It was argued that denial of the SPCC petition was necessary to maintain the delicate balance between concurrent federal and state regulatory processes.

California asserted that the type of service requested was intrastate in character and that the relief requested by SPCC ignored the clear limitation in the Communications Act of 1934, which reserves jurisdiction over intrastate communications to the respective states. (47 USC 152(b), 153(e), 221(b) (1970)). Finally, it was urged that if the SPCC petition was not to be dismissed outright a federal-state joint board should be convened pursuant to 47 USC 410(c) to consider the probable effects of the requested relief.

On October 9, 1975, the FCC adopted Memorandum Opinion and Order FCC 75-1146 (FCC Order), review of which is sought herein. The FCC Order declared that the questions presented required the FCC to make legal determinations of the extent of its authority, under the Communications Act, over the subject facilities and services. It was determined that the facilities in question are for use in facilitating an interstate transmission, thus placing the facilities within the jurisdiction of the FCC. Accordingly, it was ordered that the requested facilities must continue to be interconnected to the SPCC system pursuant to applicable interstate tariffs. Although ordering local exchange service to be interconnected to the SPCC private lines in question, the FCC declared it did not intend thereby to assert jurisdiction over the local exchange service.

California promptly filed a petition for review of FCC Order 75-1146 with the United States Court of Appeals for the District of Columbia Circuit in Docket No. 75-2060. In December 1975 the Court of Appeals consolidated California's petition for review with those filed by the National Association of Regulatory Utility Commissioners (NARUC) and PT&T in Nos. 75-2104 and 75-2157, respectively. The matter was briefed by the parties and oral argument was heard on November 19, 1976.

The Court of Appeals, by per curiam opinion, one judge dissenting, issued June 20, 1977, affirmed the orders of the FCC. The Court of Appeals held that the FCC properly recognized that it may regulate facilities used in both inter- and intra-state communications to the extent it proves "technically and practically difficult" to separate the two types of communications (56 FCC 2d 14, 19, 20 (1975)). Noting that the Communications Act specifically reserves to the states authority to regulate intrastate communications (47 USC 152(b), 221(b)), the court quoted *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793-94 (4th Cir. 1976), cert. denied, 50 L.Ed.2d 631 (1976):

> "We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205. In view of the interrelation of the provisions of the Act, the Commission's declaratory statement of its authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the act." (Appendix A, p. 6.)

In a strongly worded dissent Judge Robinson concluded that the FCC decision did not reach the necessary high standard of certainty—that it was technically and practically difficult to separate the two types of communications—which would be required before the FCC could preempt legitimate state regulatory interests. The FCC decision was characterized as proffering ". . . only an ambiguous finding unaccompanied by any evidentiary data whatsoever." (Appendix A, dissent, p. 9.)

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has applied the decision in *North Carolina Utilities Commission v. FCC, supra,* to the instant case in such a way as virtually to read Section 2(b) out of the Communications Act. *North Carolina* involved the interconnection of customer provided terminal equipment to the telecommunications network. The instant case involves an entirely different area of telecommunications. The instant case involves *usage* of transmission facilities,

not the connection of terminal equipment. Section 2(b) of the Communications Act does not distinguish between private line intrastate communication and other forms of intrastate communications. Thus the decision of the court below could be applied to other purely intrastate communications services which traditionally have been considered reserved to state regulation under Section 2(b). The important question of federal law raised by the decision of the court below has not been, but should be, settled by this Court.[8]

The legislative history of the Communications Act shows that Congress intended to reserve to the states the regulation of all intrastate communications transmitted by telecommunications carriers. Section 2(b) of the Communications Act of 1934 as amended (47 USC 152(b)) provides in pertinent part that "... nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier ...".

The fact that the SPCC communications network is part of a dedicated nationwide system over which both interstate and intrastate communications flow

[8]The decision in *North Carolina Utilities Commission v. FCC* is not challenged here. California does not oppose federal supervision of the standards for inter-connection of telecommunications terminal equipment. California does assert that Congress intended to leave regulation of intrastate telecommunications services to the states.

does not render it exclusively subject to federal regulation under the Communications Act. Virtually all telecommunications equipment is capable of transmitting both interstate and intrastate communications. The conclusion of the court below and of the FCC that it is technically and practically difficult to separately identify service over the instant facilities is simply a conclusion by the FCC untested on an evidentiary record. Preemption by the FCC of the legitimate state interest in regulating intrastate communications reserved to it by Congress was premature and was in violation of the decisions of this Court holding that a high degree of certainty is required that direct irreconcilable conflict exists between the two schemes of regulation before federal preemption will be found to exist. Moreover, the FCC's preemption order inequitably burdens intrastate ratepayers.

A. The FCC Decision Does Not Comply With the Communications Act and Disregards the Intentions of Congress

The legislative history of the Communications Act shows that Congress intended to prevent application of the *Shreveport* doctrine to the Act.[9] Section 2(b)(1) of the Communications Act, along with the definition of "interstate communications" in Section 3(e) and 221(b) (47 USC 153(e), 221(b)), make clear that Congress intended to reserve to the states ex-

[9]38 Cong. Rec. 10313 (1934); 78 Cong. Rec. 8823, 8846-47 (1934). The *Shreveport* doctrine, which permits federal authorities to regulate intrastate rates to the extent necessary to eliminate burdens on interstate commerce, derives from the case of *Houston E. & W. Texas R.R. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833 (1914).

clusive jurisdiction over intrastate telephone and telegraph communications services.

The FCC has interpreted these sections of the Act to permit intrastate private line and FX service to be treated as interstate communication, based upon a declaratory ruling that identification of the intrastate communications over the network would be technically and practically difficult to separate and that it would be impractical to require a customer to maintain two redundant facilities or to invest in expensive additional equipment. The FCC refused to make an evidentiary record upon which to base these findings. Its ruling prematurely preempted a proceeding already under way before the CPUC, which was attempting to determine whether it was technically and practically feasible to separately identify the intrastate communications transmitted over the network in question.

The FCC decision overlooks the fact that virtually all telecommunications equipment is dual in function, serving both interstate and intrastate communications. The effect of the FCC order is to decrease toll revenue support for local exchange customers in California, thus interfering with a legitimate state interest in maintaining exchange services at the lowest reasonable cost. The decision of the FCC thus fails to comply with the Communications Act, violating the intent of Congress to reserve regulation of intrastate communications to the states. *Conway Corp. v. FPC,* 510 F.2d 773 (5th Cir. 1975), affirmed *sub nom. FPC v. Conway Corp.,* 426 U.S. 271 (1976).

B. The FCC Order and the Opinion of the Court Below Conflict With Applicable Decisions of This Court

1. FCC Preemption Was Premature

By declaratory order after the filing of briefs by interested parties the FCC has preempted a field of regulation which Congress intended to reserve to the states.

This Court has repeatedly decided "... that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress had unmistakably so ordained." *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 10 L.Ed.2d 248, 257, 83 S.Ct. 1210 (1963). As discussed in the preceding section, Congress has unmistakably reserved regulation of intrastate communications services to the states. It cannot reasonably be determined that it is technically and practically too difficult to separately identify communications services over the network at issue without having made an evidentiary record. This is what the preempted CPUC proceeding was attempting to do. The FCC refused to conduct its own evidentiary proceedings. Without making such a determination based upon evidence, the FCC has unlawfully interfered with legitimate state regulation. *Head v. Board of Examiners,* 374 U.S. 424, 10 L.Ed.2d 983, 83 S.Ct. 1759 (1963). If after an evidentiary proceeding it can be determined that it is technically and practically feasible to identify intrastate communications

services over the network at issue, the state regulatory agency would have the jurisdiction to regulate such services under the Communications Act. *California v. Zook,* 336 U.S. 725, 93 L.Ed. 1005, 69 S.Ct. 841 (1949).

Therefore, it is clear that the FCC has acted prematurely in preempting jurisdiction over the intrastate communications service at issue herein.

2. The FCC Order and the Decision of the Court Below Tend to Undermine the Federal System

By the vehicle of a declaratory ruling, the FCC discouraged the CPUC from attempting to determine the scope of its authority over the intrastate service to be provided. The connection requested by SPCC had been provided. Thus there was no threat of imminent interference with interstate communications during the further conduct of the CPUC proeedings. Preemption by the FCC at that point was incompatible with the federal-state relationship. *Public Service Commission of Utah v. Wycoff,* 344 U.S. 237, 97 L.Ed. 291, 73 S.Ct. 236 (1952). *Cf. Public Utilities Commission of California v. United Air Lines, Inc.,* 346 U.S. 402, 98 L.Ed. 140, 74 S.Ct. 151 (1953); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission,* 465 F.2d 237 (3d Cir. 1972).

3. The FCC Opinion and the Decision of the Court Below Fail to Demonstrate a High Standard of Certainty of Irreconcilable Federal-State Conflict

The decision of the court below merely accepts the FCC declaratory conclusion that it is technically and

practically too difficult to separately identify the intrastate communications flowing over the network at issue and that it is impractical to require the customer to maintain two redundant facilities or to invest in expensive additional equipment. In a strongly worded nine-page dissent, Judge Robinson carefully reasons that the majority decision did not demonstrate the high standard of certainty of irreconcilable conflict between state and federal reguation, which is a necessary prerequisite to federal preemption.

Since regulation of intrastate communications has been expressly reserved to the states by Congress, the opinion of the FCC and the decision of the court below violated decisions of this Court, cited by Judge Robinson, requiring a high standard of certainty, supported by evidence, of each element essential to the exercise of the preemptory power. *North Carolina v. United States,* 325 U.S. 507, 89 L.Ed. 1760, 65 S.Ct. 1260 (1945); *accord Chicago, M., St. P. & P. R.R. v. Illinois,* 355 U.S. 300, 2 L.Ed.2d 292, 78 S.Ct. 304 (1958); *Public Service Commission of Utah v. United States,* 356 U.S. 421, 2 L.Ed.2d 886, 78 S.Ct. 796 (1958); *Florida v. United States,* 282 U.S. 194, 75 L.Ed. 291, 51 S.Ct. 119 (1931).

The decision of the court below is inconsistent with a decision rendered by a different panel of the same court earlier this year involving strikingly similar circumstances. There, the FCC was found to have denied arbitrarily a telephone company request for an evidentiary hearing to demonstrate the technical,

economic and operational benefits of a tariff requirement. The court remanded the case to the FCC. *American Tel. & Tel. Co. v. FCC,* 551 P.2d 1287 (D.C. Cir. 1977). Similarly, the FCC refused to hold an evidentiary hearing in the present case.

C. The FCC Order Inequitably Burdens Intrastate Ratepayers

FCC preemption of the state regulatory interest by means of a declaratory ruling effectively fences out the California public from participating in the determination of rates and services for intrastate communications and tends to frustrate judicial review because of the lack of an evidentiary record. *Moss v. CAB,* 430 F.2d 891 (D.C. Cir. 1970). The specialized common carrier services at issue in this proceeding are not comprehended within the existing elaborate nationwide scheme of separation of costs and settlement of revenues with respect to telecommunications equipment used in common for interstate toll and intrastate toll and exchange services. The FCC order makes no mention of this fact or of the effect of the order on local toll or exchange costs under existing separations procedures. While this difficulty may be the subject of further proceedings before the FCC, the intrastate ratepayer in the meantime is left in the basically unfair position of supporting specialized intrastate services he does not use and which are being provided at the lower interstate rate. Moreover, the FCC order affirmed by the court below puts the CPUC in the position of not having the power to correct the inequity among intra-California ratepayers.

Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 75 L.Ed. 255, 51 S.Ct. 65 (1930); *Minnesota Rate Cases,* 230 U.S. 352, 57 L.Ed. 1511, 33 S.Ct. 729 (1913).

This problem was addressed by the CPUC in its June 24, 1975, Order of Suspension and Investigation of tariff changes filed by PT&T in order to expand the interconnection of interstate services by Other Common Carriers (OCC's), of which SPCC is one. In this order the CPUC observed as follows:

> "Such arrangements could be used to by-pass and avoid the normal rates and charges provided by message toll and foreign exchange service. If such intrastate connections can, in fact, be made, the result would be a highly preferential rate treatment given to customers of other common carriers, but not available to customers of the telephone utilities in California.[10]

D. The Decision of the Court Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

This petition involves only one of a series of recent FCC decisions affecting federal-state regulation of telecommunications following the decision by the FCC,

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[10] *Suspension & Investigation of Tariff Schedules Filed by Advice Letter No. 11631 of Pacific Tel. & Tel. Co.,* Order of Suspension & Investigation in Case No. 9933 (Cal. Pub. Util. Comm'n, June 24, 1975), at 2. The PT&T tariff changes were allegedly filed in compliance with FCC Decision No. 75-450 in Docket No. 20099, 52 FCC 2d 727 (1975), which called for expansion of interconnection of OCC interstate services including FX and CCSA services. The CPUC Order was issued following receipt of a protest by the City of Los Angeles, which alleged that the tariffs sought could significantly increase the monthly rates for basic residential and business services.

in the landmark *Carterfone* case, to open the field of telecommunications to competition. *Carter v. AT&T Co. (Carterfone),* Decision No. 68-661 in Docket No. 17073, 13 FCC 2d 420 (1968). By this petition California does not intend to challenge the *Carterfone* decision or other decisions flowing from *Carterfone,* some of which this court has declined to review.[11]

It is respectfully submitted that this petition presents the Court with a crystalized issue, ripe for review, with respect to the meaning of Sections 2(b) and 221(b) of the Communications Act, in light of recent FCC and court decisions. The question now presented to this Court for the first time is whether intrastate communications services provided by an interstate, specialized common carrier are subject to state regulation pursuant to Sections 2(b) and 221 (b) of the Communications Act.

The broader question which must be decided by the Court is whether a federal agency may preempt a field of dual regulation established by Congress by

[11] *Bell Tel. Co. of Pennsylvania v. FCC,* 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975); *Wash. Util. & Transp. Comm'n v. FCC,* 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975); *North Carolina Util. Comm'n v. FCC,* 537 F.2d 787, (4th Cir.), cert. denied, ... U.S. ...... (1976); *North Carolina Util. Comm'n v. FCC,* 552 F.2d 1036 (4th Cir. 1977), petition for writ of certiorari pending. A year before the FCC implemented its terminal equipment registration program, approved in *North Carolina Utilities Commission,* 552 F.2d 1036, *supra,* the CPUC had implemented its own certification program by which customer-provided equipment could be directly connected to the network. In the proceedings now preempted by the FCC, the CPUC had already issued an interim order permitting limited competition by SCCC's with established wire line carriers (Appendix C).

simply declaring, without an evidentiary hearing, that the dual regulatory interests are technically and practically too difficult to separate. It is respectfully submitted that if such federal agency preemption is now the law, the decisions of this Court cited in this petition will have been drained of their judicial force.

CONCLUSION

California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,
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Dated: September 14, 1977.

No. 77-406

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

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FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

MCI TELECOMMUNICATIONS CORP., ET AL.
SOUTHERN PACIFIC COMMUNICATIONS CO.
PACIFIC TELEPHONE AND TELEGRAPH CO.
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION
AERONAUTICAL RADIO, INC.
DATA TRANSMISSION COMPANY
REMOTE PROCESSING SERVICES STATION, INTERVENORS

Bills of [illegible] filed within 14 days after entry of j[illegible] with disfavor upon motions to file [illegible] out of time.

No. 75-2104

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

MCI TELECOMMUNICATIONS CORP., ET AL.
SOUTHERN PACIFIC COMMUNICATIONS CO.
THE PACIFIC TELEPHONE & TELEGRAPH CO.
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASS'N.
AERONAUTICAL RADIO, INC.
REMOTE PROCESSING SERVICES STATION, INTERVENORS

No. 75-2157

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

REMOTE PROCESSING SERVICES SECTION
SOUTHERN PACIFIC COMMUNICATIONS COMPANY
AERONAUTICAL RADIO, INC.
MCI TELECOMMUNICATIONS CORPORATION, INTERVENORS

Petitions for Review of an Order of the Federal Communications Commission

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Argued November 19, 1976

Decided June 20, 1977

Rufus G. Thayer, with whom *Richard D. Gravelle* and *J. Calvin Simpson* were on the brief, for petitioners in No. 75-2060.

Stephen G. Kraskin, Deputy Assistant General Counsel, National Association of Regulatory Utility Commissioners, for petitioner in No. 75-2104.

Donald K. King, for petitioner in No. 75-2157. *James A. DeBois*, *Robert V. R. Dalenberg* and *William B. Rowland* were on the brief for petitioner in No. 75-2157.

C. Grey Pash, Jr., Counsel, Federal Communications Commission, with whom *Ashton R. Hardy* and *Daniel M. Armstrong*, Associate General Counsels, Federal Communications Commission, and *Robert B. Nicholson*, Attorney, Department of Justice, were on the brief for respondents. *John E. Ingle*, Counsel, Federal Communications Commission, also entered an appearance for respondent, Federal Communications Commission.

Herbert E. Forrest, with whom *Thormund A. Miller* was on the brief, for intervenor, Southern Pacific Communications Company. *James M. Tobin* also entered an appearance for intervenor, Southern Pacific Communications Company.

Michael H. Bader, *Kenneth A. Cox* and *William J. Byrnes* were on the brief for intervenors, MCI Telecommunications Corporation and Microwave Communications, Inc.

Herbert E. Marks and *James E. Magee* were on the brief for intervenor, Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc.

Charles R. Cutler, *John L. Bartlett* and *John B. Wyss* were on the brief for intervenor, Aeronautical Radio, Inc.

Edward P. Taptich and *Virginia S. Carson* entered appearances for intervenor, Computer and Business Equipment Manufacturers Association in Nos. 75-2060 and 75-2104.

Kevin H. Cassidy and *John M. Scorce* entered appearances for intervenor, Data Transmission Company in No. 75-2060.

Before: BAZELON, *Chief Judge*, TAMM and ROBINSON, *Circuit Judges*.

Opinion Per Curiam.

Dissenting Opinion filed by *Circuit Judge* ROBINSON.

PER CURIAM: The only substantial issue raised on appeal is whether the Commission possesses statutory authority to regulate the facilities in question. As the Commission recognized, the Communications Act grants the Commission broad powers over interstate communications, 47 U.S.C. § 151, but specifically reserves for the states authority to regulate intrastate communications, 47 U.S.C. §§ 152(b), 221 (b). The jurisdictional conflict in this case arose because the Foreign Exchange (FX) and Common Control Switching Arrangement (CCSA) facilities in question can be used for both inter- and intra-state communications.

Even though these facilities are located entirely within single states, we conclude that the Commission did not exceed its authority. At the outset, the Commission properly recognized that it may regulate facilities used

in both inter- and intra-state communications to the extent it proves "technically and practically difficult" to separate the two types of communications. 56 F.C.C. 2d 14, 19, 20 (1975), citing *U.S. Dept. of Defense* v. *General Telephone Co.*, 38 F.C.C. 2d 803, *aff'd sub nom St. Joseph Telephone & Telegraph Co.* v. *F.C.C.*, Case No. 73-1907 (D.C. Cir. Nov. 11, 1974); *AT&T-TWX* 38 F.C.C. 1127, 1133 (1965); and *Telerent Leasing Corp.*, 45 F.C.C. 2d 204 (1974), *aff'd sub nom North Carolina Utilities* v. *F.C.C.*, 537 F.2d 787 (1976). We agree with the Commission that the opposite conclusion would leave a substantial portion of the interstate communication service unregulated. . ." 56 F.C.C. 2d at 20, and that inconsistent state regulations could frustrate the Congressional goal of developing a "unified national communications service." 56 F.C.C. 2d at 20.

The Commission next observed that "the physical location of the facilities is not determinative of whether they are inter-state or intra-state for regulatory purposes." *Id.* The Commission supported this proposition with substantial case authority. *See* cases cited at *id.* Thus it was logical for the Commission to conclude that "[t]he key issue . . . is the nature of the communications which pass through the facilities, not the physical location of the lines." *Id.* at 21. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168-9 (1968). Nothing presented to us casts doubt on the Commission's conclusion that the "facilities are an integral part of a dedicated interstate communications network." *Id.* Consequently, Commission jurisdiction was present.

In addition, we note that the Commission refused to assert jurisdiction over those purely local services that could be practicably separated from inter-state services supplied through the same facilities. The Commission refused to assert authority over local exchange service, leaving any regulation over such service to the appropriate state bodies. It was suggested that the Commission

also attempt to separate inter-state FX service from intra-state FX service and assert jurisdiction only over the former. The Commission reasonably concluded that this suggestion was impractical. As the Commission noted, "requiring the customer to maintain two redundant facilities or to invest in expensive additional equipment" would frustrate the Commission's responsibility "to make available, so far as possible to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges. *Id.* at 19, quoting 47 U.S.C. § 151.

Quite recently, the Fourth Circuit had occasion to evaluate many of the arguments raised here. In finding that the Commission's assertion of jurisdiction was proper in that case, the court succinctly articulated the principles that govern this case as well:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205. In this view of the interrelation of the provisions of the Act, the Commission's declaratory statement of its authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the act.

North Carolina Util. Com'n v. *F.C.C.*, 537 F.2d 787, 793-4 (1976), cert. denied, 45 U.S.L.W. 3427 (Dec. 14, 1976).

Consequently, the order of the Federal Communications Commission is

Affirmed.

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ROBINSON, *Circuit Judge*, dissenting: Were this case an instance of demonstrated inability to regulate interstate communication without also regulating some aspect of intrastate communication, I would join my colleagues in affirming the Commission. By my reading, however, the record here does not confront us with that sort of situation. Not only does the Commission's critical finding fall short of a standard of unavoidability, but the evidence before the Commission would not have supported a finding purporting to meet it. I must, accordingly, dissent.

I

In 1972, the Federal Communications Commission licensed intervenor Southern Pacific Communications Company (SP) as a common carrier of interstate microwave communications. By virtue of Commission action in other cases,[1] SP is entitled to interconnect with Bell System affiliates to provide interstate foreign exchange (FX) and common control switching arrangement (CCSA) service to its customers.[2] Not content with its interstate business,[3] however, SP subsequently applied to the Public

[1] *E.g., Bell Sys. Tariff Offerings*, 46 F.C.C.2d 413, *aff'd sub nom. Bell Tel. Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975).

[2] FX service allows a person "located in one [service area] to, in effect, maintain a local phone in another [service area]." *Bell Tel. Co.* v. *FCC, supra* note 1, 503 F.2d at 1254 n.4, citing *Bell Sys. Tariff Offerings, supra* note 1, 46 F.C.C.2d at 418 n.5 (1974). Thus an FX subscriber in Washington may call and be called by anyone in New York. CCSA "is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises." *Id.*

[3] One SP official testified before the Public Utilities Commission of California that some customers were unwilling to deal with SP unless it offered both interstate and intrastate services. *Pacific Tel. & Tel. Co.* v. *Southern Pac. Communica-*

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Utilities Commission of California (California) for permission to operate intrastate as well.

The application posed novel problems for California, because SP's proposal portended intrastate competition with specialized communication services offered by petitioner Pacific Telephone & Telegraph Company (PT&T), the state's Bell System affiliate. Under state-approved tariffs, the revenues PT&T derived from those services subsidized certain others, such as local exchange service.[4] California was uncertain as to how SP's competition might affect PT&T's revenues, so it could not tell what competitive responses on PT&T's part would best suit the public interest.[5]

California therefore initiated a controlled experiment, so to speak, on intrastate competition in telecommunications. In its interim opinion, it authorized SP to conduct—in addition to its interstate operations, over which California claimed no authority—limited intrastate point-to-point service.[6] But it subjected its intrastate grant to various conditions, including the following:[7]

> 7. Any direct connection of private line circuits to the exchange network is prohibited. This includes any connection similar to foreign exchange service.

Not two months after California issued its interim opinion, SP asked PT&T to interconnect SP's Los Angeles-San Diego private line circuit with the PT&T San Diego exchange network.[8] PT&T acceded to the request, but for reasons of its own sought California's instruction on

tions Co., No. 84167 (Cal. Pub. Utils. Comm'n, Mar. 4, 1975) (unreported), Joint Appendix (J.App.) 215.

[4] J.App. 232.

[5] J.App. 236.

[6] J.App. 237. I am not advised of further administrative or judicial treatment of this matter.

[7] J.App. 237.

[8] J.App. 54-55.

how it should be treated "in view of the apparent prohibition of Ordering Paragraph 7. . . ."[9] This gambit prompted SP to petition the Federal Communications Commission for a ruling declaring that the Commission, and not California, possessed jurisdiction over all controversies relating to interconnection between the Bell System and competing telecommunications carriers,[10] in order that SP might operate in disregard of Paragraph 7's service limitation.

The Commission dealt with the jurisdictional question as an all-or-nothing proposition. SP's Los Angeles-San Diego link was in its view either an interstate facility subject to exclusive federal jurisdiction or an intrastate facility wholly beyond it.[11] Thus framed, the inquiry was easily answered in favor of federal jurisdiction. The link was "part of a dedicated interstate communications network,"[12] and 82 percent of the calls it was to carry would originate outside California.[13] So it was that the Commission held that California could not impose restrictions on interconnections between the SP line and the San Diego exchange.[14]

II

It cannot be gainsaid that the Commission has broad powers to regulate the terms and conditions upon which interstate communications will flow along SP's lines, and California neither has nor claims a prerogative to stem that flow. The dispute centers, rather, on the Commission's ouster of state jurisdiction over the 18 percent of messages carried over SP's San Diego link that are

[9] J.App. 41.

[10] J.App. 1.

[11] *American Tel. & Tel. Co.*, 56 F.C.C.2d 14, 16 (1975).

[12] *Id.* at 21.

[13] *Id.* at 16.

[14] *Id.* at 21.

wholly intrastate. Although the Commission declined SP's invitation to exert jurisdiction over the local exchange service,[15] it has foreclosed California from banning intrastate FX service that does not comport with California's perception of the public interest.

The linchpin of California's[16] assignment of error is Section 2(b) of the Communications Act of 1934,[17] which in pertinent part specifies that

> . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

It is clear that the congressional purpose prompting adoption of this section was to "reserve[] to the states exclusive jurisdiction over intrastate telephone and telegraph communications"[18] to make certain that "the new federal commission, with its 'expansive powers,' would not intrude on the existing regulatory authority of the state commissions over primarily intrastate companies and services."[19] Since the impact of the Commission's

[15] *Id.*

[16] California is joined in this contention by PT&T and the National Association of Regulatory Utility Commissioners.

[17] Act of June 19, 1934, ch. 652, tit. I, § 2(b), 48 Stat. 1065, as amended, 47 U.S.C. § 152(b) (1970).

[18] S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934). See H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934) ("[t]he bill . . . exempts the intrastate business of any carrier"); 38 Cong. Rec. 10313 (1934) (remarks of Rep. Rayburn). *Cf.* 78 Cong. Rec. 8823 (1934) (remarks of Sen. Dill) (discussing both § 2(b) and § 221(b), which provides for state retention of jurisdiction over local exchanges that cross state lines). See also 78 Cong. Rec. 8846-8847 (1934).

[19] *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 174 U.S.App.D.C. 374, 407, 533 F.2d 601, 634 (1976) (Wright, J., dissenting). See also *id.* at 380, 533 F.2d at 607 (per Wilkey, J.).

order under review is to work just such an intrusion, at the very least it stands in need of some compelling justification.

The Commission acknowledges on the one hand that Section 2(b) "denies [it] jurisdiction over intrastate communications,"[20] but disputes on the other that that section "sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority"[21] to ensure that interstate communications are conducted consonantly with the public interest.[22] It relies on a spate of cases upholding Commission ouster of state regulation over interconnection equipment that processes both intrastate and interstate messages.[23] In these cases,

[20] *American Tel. & Tel. Co., supra* note 11, 56 F.C.C.2d at 20.

[21] The language is that of the Fourth Circuit in *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787, 793 (1976), *aff'g Telerent Leasing Corp.*, 45 F.C.C.2d 304 (1974), upon which the Commission somewhat less elegantly relied. *American Tel. & Tel. Co., supra* note 11, 56 F.C.C.2d at 20-21. See generally Note, *Competition in the Telephone Equipment Industry: Beyond Telerent*, 86 Yale L.J. 538, 540-544 (1977).

[22] *C*[illegible] U.S.C. § 151 (1970).

[23] *E.g., North Carolina Utils. Comm'n* v. *FCC, supra* note 21; *United States Dep't of Defense*, 38 F.C.C.2d 803 (1973), *aff'd sub nom. St. Joseph Tel. & Tel. Co.* v. *FCC*, 164 U.S. App.D.C. 369, 505 F.2d 476 (1974). Many of the other cases cited in this regard are inapposite, dealing as they do with the Commission's significantly wider powers over broadcasting. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169 & n.29, 88 S.Ct. 1994, 2000-2001 & n.29, 20 L.Ed.2d 1001, 1011 & n.29 (1968). *Cf.* S. Rep. No. 1090, 83d Cong., 2d Sess. 1 (1954) (reporting on Act of Apr. 27, 1954, Pub. L. No. 83-345, 68 Stat. 63, which added the words "or radio" to 47 U.S.C. § 152(b) (1970), text *supra* at note 17, in order to ensure that intrastate radio (and microwave) common carriers would not be subjected to the Commission's broadcasting jurisdiction.

however, the facilities were found to be "used in common and indivisibly"[24] for intrastate and interstate service, or "a single unified regulation pattern" was found to be "essential" in a system with vital national functions and no substantial and important local capabilities.[25] In the context of the sensitive congressional balancing in Section 2(b) of federal and state concerns, then, these cases counsel departure from the legislative model of concurrent jurisdiction over facilities devoted to both kinds of traffic only when conflict between exercises of federal and state power is for all practical purposes "unavoidable."[26]

III

The validity of the Commission's arrogation of power to regulate intrastate FX service thus depends upon whether it is imperative. And the Commission did state that limited access by SP to the San Diego exchange permitting interstate connection but preventing intrastate connection would be "technically and practically difficult."[27] The Commission did not, however, undertake to explain why such a difficulty would arise,[28] nor how close that

[24] *North Carolina Utils. Comm'n* v. *FCC, supra* note 21, 537 F.2d at 791, quoting *Telerent Leasing Corp., supra* note 21, 45 F.C.C.2d at 215.

[25] *United States Dep't of Defense, supra* note 23, 38 F.C.C. 2d at 813-815.

[26] *North Carolina Utils. Comm'n* v. *FCC, supra* note 21, 537 F.2d at 792.

[27] *American Tel. & Tel. Co., supra* note 11, 56 F.C.C.2d at 19.

[28] The Commission does allude to the possibility of "[r]equiring the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts." *Id.* The National Association of Regulatory Utility Commissioners commented to the Commission that "[t]he availability of call restrictors is well known,

difficulty is to impossibility.[29] This unfortunate lack of specificity is understandable, since the record is devoid of any evidentiary basis for the Commission's assertion,[30] and it is hardly common knowledge.[31] It is to be noted, moreover, that the Commission refused to convene a proceeding in which this factual question could be fleshed out.[32] Since the Commission's finding comes up substantively short and even so is unsupported by the evidence, I cannot accept the conclusions that flow from it.

These basic deficiencies vitiate the Commission's decision whether or not SP is correct in its contention—upon

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and a set of facilities for interstate circuits need not also be used for intrastate circuits." J.App. 311. *Cf.* J.App. 148 (comments of American Telephone and Telegraph Company). SP denigrates this suggestion on grounds that "it would be most impractical . . . to segregate intrastate and interstate usage of the FX circuits involved" by such means. J.App. 342. So far as the record shows, this "impracticality" derives from the traditional lack of metering devices on private lines, for call restrictors apparently do operate on other sorts of lines to restrict the geographical ambit of service.

[29] If the "difficulty" to which the Commission refers is merely a matter of expense, such as that incurred by affixing call restrictions to SP's private lines, see note 28 *supra*, the Commission can forestall any burdening of interstate commerce merely by allocating that expense to the intrastate traffic. See 47 U.S.C. § 221(c) (1970). To be sure, such an allocation may not please SP, but that is not the Commission's job, which is at an end when the threat to interstate communications has been dissolved. That the onus is placed on intrastate communications—and so outside the Commission's bailiwick—leaves the hard choices to California, where they belong.

[30] See note 28 *supra*.

[31] *Cf.* 2 K. Davis, Administrative Law Treatise § 15.03 (1958).

[32] *American Tel. & Tel. Co., supra* note 11, 56 F.C.C.2d at 20.

which I intimate no view—that the Commission's jurisdiction over intrastate communications is commensurate with that which the Interstate Commerce Commission enjoys over intrastate transportation.[33] While the latter agency is endowed with greater leeway to intervene in intrastate matters than are others created contemporaneously with the Communications Commission,[34] its "justification for the exercise of this exceptional federal power to interfere" must nevertheless "be made definitely and clearly apparent." [35] To be sustained in any abrogation of state regulatory authority, the Interstate Commerce Commission must make "clear findings, supported by evidence, of each element essential to the exercise of

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[33] 49 U.S.C. § 13(4) (1970) codifies the powers attributed to the Interstate Commerce Commission in the *Shreveport Case* (*Houston, E. & W. T. Ry.* v. *United States*), 234 U.S. 342, 351-352, 34 S.Ct. 833, 836, 58 L.Ed. 1341, 1348 (1914): "[w]herever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule. . . ." In that case the Commission prohibited enforcement of intrastate traffic rates that worked an undue discrimination on interstate commerce. *Cf. North Carolina* v. *United States*, 325 U.S. 507, 511, 65 S.Ct. 1260, 1263, 89 L.Ed. 1760, 1765 (1945).

[34] See, *e.g.*, *FPC* v. *Conway Corp.*, 426 U.S. 271, 277, 96 S.Ct. 1999, 2003, 48 L.Ed.2d 626, 632 (1976) ("the legislative history of [the Federal Power Act] indicat[es] that the section was expressly limited . . . to foreclose the possibility" that the *Shreveport* doctrine would apply. Cf. 78 Cong. Rec. 8823 (1934) (remarks of Sen. Dill adverting to the *Shreveport* decision during debates on the Communications Act).

[35] *Chicago, M., St. P. & P. R.R.* v. *Illinois*, 355 U.S. 300, 306, 78 S.Ct. 304, 308, 2 L.Ed.2d 292, 298 (1958). Accord, *Utah Pub. Serv. Comm'n* v. *United States*, 356 U.S. 421, 425, 78 S.Ct. 796, 799, 2 L.Ed.2d 886, 891 (1958); *Florida* v. *United States*, 282 U.S. 194, 211-212, 51 S.Ct. 119, 123-124, 75 L.Ed. 291, 302-303 (1931).

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that power. . . ,"[36] and those findings "must meet a 'high standard of certainty.'"[37] No such standard has been satisfied in the case *sub judice*. The Commission thus far has proffered only an ambiguous finding unaccompanied by any evidentiary data whatsoever. This showing is a far cry from what is required, and since unfortunately it has placated my brethren, I must part company with them.

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[36] *North Carolina* v. *United States, supra* note 33, 325 U.S. at 511, 65 S.Ct. at 1263, 89 L.Ed. at 1765. See *Utah Pub. Serv. Comm'n* v. *United States, supra* note 35, 356 U.S. at 425, 78 S.Ct. at 799, 2 L.Ed.2d at 891.

[37] *North Carolina* v. *United States, supra* note 36, 325 U.S. at 511, 65 S.Ct. at 1263, 89 L.Ed. at 1765, quoting *Illinois Cent. R.R.* v. *Public Utils. Comm'n*, 245 U.S. 493, 510, 38 S.Ct. 170, 176, 62 L.Ed. 425, 438 (1918). Accord, *Utah Pub. Serv. Comm'n* v. *United States, supra* note 36, 356 U.S. at 425, 78 S.Ct. at 799, 2 L.Ed.2d at 891.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 75-1146
37267

In the Matter of	)	
	)	
AMERICAN TELEPHONE AND	)	
TELEGRAPH COMPANY and the	)	Received
Associated Bell System Companies	)	Oct. 20,
	)	1975
Interconnection With Specialized	)	
Carriers in Furnishing Interstate	)	Legal
Foreign Exchange (FX) Service and	)	Division
Common Control Switching	)	
Arrangements (CCSA)	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 1975; Released: October 16, 1975

By the Commission: Commissioner Robinson concurring in the result; Commissioner Hooks dissenting.

1. We have before us a Petition for Declaratory Rulings and for Enforcement of Cease and Desist Orders (Petition) filed by Southern Pacific Communications Company (SPCC). Several parties have filed pleadings either supporting or opposing the petition, and SPCC has filed a reply. SPCC raises significant questions regarding Federal-State jurisdiction and what constitutes interstate and intrastate communications.

2. SPCC asks us to grant six specific areas of relief against alleged actions by the American Telephone and Telegraph Company (AT&T) and the Associated Bell System Companies (the Bell System Companies), with particular reference to the Pacific Telephone and Telegraph Company (PT&T) and Southwestern Bell Telephone Company (SW Bell), to enforce our Cease and Desist Order and implement our Decision in Docket No. 19896, Bell System Tariff Offerings, 46 FCC 2d 413 (1974), aff'd sub nom Bell Tel. Co. of Pennsylvania v. FCC, 503 F.2d 1250 (1974), cert. denied, 43 U.S.L.W. 3654 (1975). The following relief is requested:

(1) That the Commission issue a declaratory ruling reaffirming that the Commission has primacy in authority over the terms and conditions governing the interconnection of facilities of the Bell System Companies essential to the rendition by the specialized common carriers of all of their authorized interstate and foreign communications services, including interconnection by the specialized carriers into the Bell System Companies' local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into Bell System Common Control Switching Arrangements (CCSA);

(2) That the Commission issue a declaratory ruling reaffirming that it possesses and has exercised exclusive authority and jurisdiction over such interconnection facilities so as to preempt any State action invoked to oust or restrict the Commission from its jurisdiction;

(3) That the Commission issue a declaratory ruling reaffirming that its prior rulings and orders in Docket No. 19896 require the Bell System Companies to provide all FX and CCSA interconnections necessary for the specialized carriers to provide the full scope of interstate private line service, including specifically that the Bell System Companies upon order of a specialized carrier must provide a CCSA or an FX interconnection at one end of a private line circuit between two points, whether or not the two points are located within a single state, whenever the other end is connected by a switch to a circuit in interstate service;

(4) That the Commission issue a declaratory ruling that the complaints filed by PT&T before the Public Utilities Commission of California concerning a Southern Pacific CCSA-FX interconnection, and by Southwestern Bell before the Corporation Commission of Oklahoma concerning Southern Pacific FX interconnections, each connected by a switching arrangement with interstate service furnished to the customers, constitute a violation of the Commission's cease and desist orders in Docket No. 19896 enjoining AT&T and the Bell System Companies from engaging in any conduct and implementing any policies or practices designed to deny or delay the establishment of interconnection with specialized carriers of facilities, including FX and CCSA, for the rendition by the specialized carriers of their authorized interstate and foreign

communications services;

(5) That the Commission direct PT&T and Southwestern Bell to withdraw the complaints before the California and Oklahoma Commissions, respectively, and enjoin the Bell System Companies from engaging in any further conduct or implementing any policies or practices before any State regulatory agencies designed to deny or delay to specialized carriers the interconnection of facilities, including FX and CCSA, ordered by this Commission; and

(6) That the Commission take such action and grant such other and further relief as to the the Commission may seem just and proper in the premises.

3. There is no dispute as to the basic facts of this case. SPCC is a Specialized Common Carrier authorized by us to offer interstate private line services. Pursuant to various Commission orders, AT&T and the Bell System Companies must offer interstate and local distribution facilities to other common carriers (OCCs) in connection with the OCC's authorized interstate services. See e.g., Docket No. 19896, supra and AT&T Offer of Facilities for Use by Other Common Carriers Docket No. 20099, 52 F.C.C. 2d 727 (1975).

4. SPCC has also been authorized to offer certain intrastate private line services by the California Public Utilities Commission (PUC) and the Oklahoma Corporation Commission, but

in both cases subject to certain conditions and restrictions.[1] The Commission does not question the validity of such orders, but, as the State Commissions recognized, these conditions and restrictions apply only to intrastate facilities and services. The question before us thus is whether the subject facilities and services are interstate or intrastate. If they are the latter, we have no jurisdiction and the State orders, with their restrictions, apply. If they are interstate, our jurisdiction applies, and the State orders by their own terms are inapplicable.

5. The specific facilities which are the subject of the present Petition are lines physically located within one state which are designed to extend, through a switch, interstate FX or Common Control Switching Arrangements (CCSA) from the interstate terminal point to another point in the state. In California, the SPCC FX

1/ The California PUC, in an Interim Decision dated March 4, 1975 (Decision No. 84167) conditioned SPCC's grant, inter alia, by ruling:

> Any direct connection of private line circuits to the exchange network is prohibited. This includes any connection similar to foreign exchange service.

The Oklahoma Commission, by Order No. 108727, dated November 14, 1975, granted application of United Video, Inc., predecessor to SPCC, with the following condition:

> Certificated telephone companies will be permitted, but not required, to furnish local loops . . .

line will extend to users in San Diego an AT&T provided American Airlines interstate CCSA network which terminates in Los Angeles. It also provides local San Diego telephone exchange access to those who are on the CCSA network, whether located in California or in some other state.[2] The connections requested from PT&T extend the FX line into the San Diego telephone exchange and into the CCSA network in Los Angeles through a PT&T switch. SPCC alleges that 82% of the calls involved in this system will be originated from points outside California. In Oklahoma SPCC is providing FX lines between Tulsa and Oklahoma City, connected by an SPCC switch to SPCC interstate FX lines into Texas. SW Bell is asked to furnish local loops in Tulsa and Oklahoma City.

6. In support of its Petition, SPCC cites our Decision in Docket No. 19896, supra, as requiring Bell System interconnection with OCC private line services, including FX and CCSA. It also points to recent amendments made to AT&T Tariff FCC No. 260 as a result of Docket No. 20099, supra, under which a customer is charged an interstate rate for interexchange Bell System facilities within a single state when connected to an interstate channel through facilities provided either by AT&T or an OCC. It contends that the present situation is essentially the same as that provided for in this tariff provision.

2/ The system as presently configured does not permit telephones in San Diego to access the CCSA network through the facilities in question.

7. SPCC further alleges that, although PT&T and SW Bell have provided the requested facilities, installation was delayed due to actions by the Bell Companies before the two State Commissions. Presently, complaints against SPCC are pending before the California and Oklahoma Commissions, filed by PT&T and SW Bell, respectively.[3] The filing of those complaints, SPCC asserts, violates the Cease and Desist Orders in Docket No. 19896 by creating Federal-State Jurisdictional conflicts over an issue which it alleges has been decided by this Commission.

8. AT&T, PT&T and SW Bell (Bell) jointly filed Comments to SPCC's Petition. They indicate that they have provided all the connections SPCC has requested in Oklahoma and California, and, therefore, they contend that the allegation of SPCC that they have violated our Cease and Desist Order (Docket No. 19896) is without foundation. Bell further alleges that we never ruled on the question of interconnection for OCC intrastate operation. It asserts that our action on this petition would foreclose consideration of whether SPCC was complying with restrictions in state orders and certificates and puts forth several procedural alternatives.

9. Bell suggests that we hold our action in abeyance pending action by the California and Oklahoma Commissions, as such state action will

3/ Copies of these complaints are attached in the Appendix to this Order.

help clarify the issues and develop a more complete record. It may, Bell asserts, avoid a jurisdiction conflict entirely. As an alternative, Bell proposes the prompt convening of a Federal-State Joint Board pursuant to Section 410 of the Communications Act to recommend the proper jurisdictional treatment of SPCC's services. Finally, if we choose to proceed directly by means of a declaratory ruling, Bell asks us first to call conferences with interested parties, including representatives of the State Commissions, to define the jurisdictional disputes. On the merits, Bell disagrees with SPCC that the mere filing of complaints with State Commissions violates our Cease and Desist Order in Docket No. 19896, especially since it claims that neither that decision nor our Order in Telerent Leasing Corp., 45 FCC 2d (204 (1974), petition for review pending sub nom. North Carolina Utilities Commission v. FCC (No. 74-1229, 4th Cir.) addressed the present issues.

10. We have received an Opposition to the SPCC Petition from the National Association of Regulatory Utility Commissioners (NARUC). It states that granting any declaratory relief is a matter of discretion and alleges that SPCC has not made a case for the exercise of such discretion. NARUC gives several reasons for this. First, it asserts that no "uncertainty or confusion" exists in this case as existed in Telerent, supra. Second, it contends that Federal-State relations are so fundamental that any decision must be taken after considerable study, and the SPCC petition would ask us to decide the issue without such careful consideration. Third, SPCC has

obtained state authorization and NARUC asserts it cannot ignore State remedies which have not been shown to be inadequate. Fourth, NARUC contends that dual regulation is impractical and questions of fact exist which make a declaratory ruling improper. Finally, NARUC asserts that SPCC may be engaging in a subterfuge to evade State regulation of intrastate communications services. As a relief, NARUC requests denial of the petition and the convening of a Federal-State Joint Board to consider the jurisdictional issues. The Opposition is accompanied by a resolution of the NARUC executive committee opposing the SPCC petition.

11. In replying to Bell and NARUC, SPCC asserts, inter alia, that this Commission is the appropriate forum to determine the extent of its interconnection orders. It claims that Federal regulation pre-empts State regulation where the two conflict. It asserts that Commission precedents require that we assert jurisdiction and conclude that the FX services in question herein are interstate in nature.

12. Oppositions to SPCC have also been received from the United States Independent Telephone Association (USITA) and from the State of California and the California Public Utilities Commission (California). MCI Telecommunications Corporation, Data Transmission Company and Aeronautical Radio, Inc., filed in support of the petition. California contends that SPCC's petition is premature, as State proceedings have not been concluded and therefore the matter is not ripe for decision.

Accordingly, it asks us to dismiss the petition, or, in the alternative, to convene a Federal-State Joint Board pursuant to Section 410(c) of the Act. In a separate reply to California and USITA, SPCC asserts that the key issue herein is the extent of this Commission's own jurisdiction rather than the lawfulness of any decisions which the State might issue.

Discussions and Conclusions

13. At the outset, we believe it inappropriate to defer action on the SPCC Petition pending the outcome of proceedings in California and Oklahoma. The questions presented here are legal determinations of the extent of our authority under the Communications Act over the subject facilities and services, and it is for us, rather than the States, to interpret the extent of our jurisdiction. As we stated in Telerent Leasing Corporation, supra at 213:

> [W/e are not obliged to, nor do we deem it appropriate to, await some definitive action by a State or a carrier which creates a conflict between Federal and State regulations having the ingredients of a conventional "case or controversy" before issuing [a declaratory] ruling. As an administrative agency, we are vested by statute with broad and discretionary power to devise and use procedures, such as the issuance of declaratory judgments, as may be reasonably appropriate to discharge our statutory responsibilities with respect to effective regulation of interstate and foreign communication, including the clarification of the scope and effect of rulings issued by us in the performance of those responsibilities. (See F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 142-43 (1940); Section 4(j) of the Communications Act . . .).

The principal question presented here, whether or not the facilities in question are interstate is one which does not require interpretation of State statutes or rulings, thus no need exists to await the outcome of State proceedings.

14. By the same token, we believe it inappropriate to convene a Federal-State Joint Board pursuant to Section 410(c) of the Act, as the Bell carriers, NARUC and California, among others, have requested. Parties to the Telerent case, supra, had made the same request, and we therein refused to convene the Board saying (at 214):

> The Joint Board is an appropriate vehicle for the consideration of technical and economic aspects of the interconnection policies and tariffs. It is not a proper or appropriate vehicle for determining the statutory jurisdiction of this Commission and the legal effects of policies promulgated by us in furtherance of our statutory responsibilities.

15. Since the facts of this case are not in dispute, and no party has disagreed with SPCC's

characterization of the capabilities of the facilities, a hearing is not required. Stone v. F.C.C., 466 F.2d 316 (D.C. Cir., 1972); Columbus Broadcasting Coalition v. F.C.C., 505 F.2d 320 (D.C. Cir., 1974). Nor, as indicated above, is there any reason to await State action, since interpretation of State grants or orders is not required for a solution to the legal question of jurisdiction. Accordingly, we believe the most efficient procedure is for us to rule now on the legal question of the locus of regulatory jurisdiction over the facilities in question. This will provide immediate guidance to the States and carriers as to the interconnections and facilities which AT&T and the Bell Associated Companies must offer to SPCC.

16. The SPCC facilities in question are located within the States of California and Oklahoma and terminate in switches which are designed to interconnect with an interstate CCSA network (California) or one of several interstate FX lines (Oklahoma). In both states, the lines may be utilized alternatively to access a foreign telephone exchange located within the same state as the customer's terminal facilities. Furthermore, the facilities in both California and Oklahoma constitute part of dedicated interstate private line networks which are clearly identifiable as carrying communications of only the customer. They are distinguishable from the non-dedicated public switched telephone network, in which the facilities are intended to be used by all Bell System customers interchangeably for interstate or intrastate calls. If these SPCC facilities are interstate the Bell System Companies

must interconnect their facilities with those of SPCC and must provide SPCC with any requested local distribution facilities. If the facilities are intrastate they are subject to the interconnection policies established by the respective State Commissions.

17. One solution proposed in the pleadings would be to limit transmissions over the private line which is interconnected with Bell facilities to interstate calls, leaving intrastate transmissions to a separate FX line which is subject to restrictions imposed by the States. Other than resolving the present conflict, this "solution" is clearly not in the public interest. Requiring the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts would violate our congressional mandate in Section 1 of the Communications Act to regulate "interstate and foreign commerce in communication by wire or radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable changes."

18. In a somewhat similar case, U.S. Department of Defense v. General Telephone Company, 38 FCC 2d 803 (Review Board, 1973) affirmed FCC 73-854, affirmed sub nom St. Joseph Telephone and Telegraph Co., v. F.C.C. Case No. 73-1907 (D.C. Cir., Nov. 11, 1974), we asserted jurisdiction over Dial Restoration Panel (DRP) equipment which is part of a nationwide defense communications system even though

the facilities were used in part for the transmission of intrastate communications. As is the case here, it was technically and practically difficult to "split" the DRP between interstate and intrastate transmission functions, and it was held that filing of interstate tariffs with this Commission would not be an "unnecessary burden" to either the carriers or the Commission.

19. We have dealt with the question of our jurisdiction over facilities and services which are used for both interstate and intrastate communications in several other cases as well. For example in AT&T-TWX, 38 FCC 1127 (1965) we held at 1133:

> We find nothing in Section 2(b)(1) which imposes any limitation upon our full authority over interstate communication service. For us to conclude that, because the facilities or instrumentalities are used in intrastate as well as interstate communications service, we do not have jurisdiction, or that we should not exercise it, would leave a substantial portion of the interstate communication service unregulated. We do not believe Congress so intended.

Similarly, in Telerent, supra, 45 F.C.C. 2d 204, 217-220, we concluded that Congressional intent in the Communications Act to make available a unified, nationwide communications service would be frustrated if each of the State and local jurisdictions could impose its own terms and conditions for the interconnection with the

switched telephone network of equipment which is to be used for both interstate and intrastate communications services. As a result, if the facilities in the present case are interstate, even if they are capable of being utilized for intrastate services as well, they are subject to terms and conditions which this Commission imposes.

20. We now turn to an examination of whether or not the lines in question are interstate, and thus subject to our interconnection policies and tariff rates and conditions. As Judge Newcomer recently stated, the physical location of the facilities is not determinative of whether they are interstate or intrastate for regulatory purposes.

> The Courts have held that transmissions facilities located entirely within one state are not thereby immune from the Commission regulation if those facilities are used in an interstate transmission network. United States v. Southwestern Cable Co., 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed. 2d 1001 (1968); Ward v. Northern Ohio Telephone Company, 300 F.2d 816 (6th Cir.), cert. denied, 371 U.S. 820, 83 S.Ct. 37, 9 L.Ed.2d 61 (1962); California Interstate Telephone Co. v. FCC, 117 U.S. App. D.C. 255, 328 F.2d 556 (1964). It has also been held that Commission regulation of interstate communications does not end with the local switchboard, but continues to the transmission's ultimate destination. United States v.

American Telephone and Telegraph Co., 57 F.Supp. 451 (S.D. N.Y. 1944), aff'd sub nom. Hotel Astor, Inc. v. United States, 325 U.S. 837, 65 S.Ct. 1401, 89 L.Ed. 1964 (1945). And when a local transmission facility is included in an interstate transmission network the regulation of the interstate uses of that facility lies exclusively with the FCC. Ivy Broadcasting Company v. AT&T, 391 F.2d 486 (2d Cir. 1968).4/

21. Section 2(b) of the Act, 47 U.S.C. 102(b), denies the Commission jurisdiction over intrastate communication, while Section 221(b), 47 U.S.C. 221(b), gives the States or local governments authority to regulate exchange service "even though a portion of such exchange service constitutes interstate or foreign communication." Conversely, the States do not have jurisdiction over interstate communications (see Section 1 of the Act, 47 U.S.C. 101).5/

4/ MCI Communications Corp. v. American Telephone and Telegraph Co., 369 F.Supp 1004, 1029 (E.D., Pa. 1974), vacated (on grounds that District Court should have deferred to FCC primary jurisdiction), 496 F.2d 214 (3d Cir., 1974).

5/ These are dedicated interstate private lines which terminate in the local exchange. They are not themselves part of a local exchange service and are thus not subject to Sections 2(b)

(cont. p. 32)

22. The key issue in determining this question before us is the nature of the communications which pass through the facilities, not the physical location of the lines. United States v. Southwestern Cable Co., 392 U.S. 157, 168-9 (1968). Under the facts given us in both the California and Oklahoma situations, the SPCC facilities are an integral part of a dedicated interstate communications network. The lines in California extend the nationwide CCSA network from Los Angeles into San Diego, while the Oklahoma facilities extend interstate foreign exchange services into other points within the State. These arrangements, supplied at customer request, render the facilities interstate and place them within our jurisdiction. Therefore, the Bell Companies are required to interconnect their facilities with those of SPCC and to provide SPCC with local distribution facilities in connection with these services. (Docket No. 19896, supra; Docket No. 20099, supra).

23. We now turn to the appropriate remedy, and to SPCC's requests for relief. Since PT&T and SW Bell are presently providing the facilities SPCC has requested and are not implementing any policy or practice which forecloses SPCC

5/ (cont. from p. 31)
and 221(b). While the States clearly have the authority to regulate the local exchange service pursuant to Sections 2(b) and 221(b), they cannot in so doing block interstate commerce by prohibiting interstate access to foreign exchanges or by discriminating against or among interstate services.

from establishing through routes, we cannot agree with SPCC that our Cease and Desist Orders in Docket No. 19896 are thereby violated. The Bell Companies must, however, continue to provide the requested interconnections and facilities as well as any such others needed by SPCC. The filing of complaints with the State Commissions, though superfluous since the facilities are subject to our jurisdiction, does not per se violate our Docket No. 19896 Cease and Desist Orders. We shall not therefore direct SW Bell and PT&T to withdraw the complaints before State Commissions, but we would hope that they abandon such unnecessary proceedings.

24. We conclude that the Bell System Companies must continue to provide the interconnections and facilities to SPCC to interconnect with the facilities described herein located within the States of California and Oklahoma, pursuant to applicable interstate tariffs. SPCC implies, however, in asking us to take jurisdiction over the FX services outlined in its petition, that we should assert jurisdiction over the local exchange ser ice which is accessed through the dedicated private line. While we are herein requiring the Bell Companies to interconnect local exchange service to the SPCC private lines in question, we do not thereby intend to assume jurisdiction over the local exchange service.

25. Accordingly, IT IS ORDERED, that AT&T, PT&T, SW Bell and the other Bell System Companies must continue to offer facilities and services to SPCC as specified in paragraph 24 herein.

26. IT IS FURTHER ORDERED, that the Petition for Declaratory Rulings and For Enforcement of Cease and Desist Order IS GRANTED IN PART AND DENIED IN PART as provided herein.

FEDERAL COMMUNICATIONS
COMMISSION

Vincent J. Mullins
Secretary

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,	)	FILED PUC June 6, 1975
Complainant,	)	
vs.	)	S.F. Off. No._____
SOUTHERN PACIFIC COMMUNICATIONS COMPANY,	)	Case No. 9929
Defendant.	)	

COMPLAINT

Pursuant to Section 1707 of the California Public Utilities Code, the complaint of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (hereinafter "Pacific"), 140 New Montgomery Street, San Francisco, California 94105, respectfully shows:

I

The defendant is Southern Pacific Communications Company (hereinafter "SPC"), 1 Adrian Court, Burlingame, California 94101.

II

By Decision No. 84167, dated March 4, 1975, this Commission granted a certificate of public convenience and necessity to SPC, authorizing it, as a public utility, to establish intercity private line communications service

for voice and data transmission between the cities of of Bakersfield, Fresno, Los Angeles, Merced, San Francisco and Stockton.

III

Since Decision No. 84167 was rendered, SPC has ordered facilities from Pacific which would enable SPC to connect its private line circuits between Los Angeles and San Diego to Pacific's exchange network in San Diego. Specifically, the orders request that Pacific connect the San Diego end of SPC's private line circuits with Pacific's San Diego local exchange. At the Los Angeles end, SPC has ordered connection with a switching arrangement which is part of a private line network furnished to American Airlines, Inc. by A.T.&T. Copies of those orders are attached as Exhibit A. A schematic diagram of the requested connections is attached as Exhibit B.

IV

Pacific is informed and believes and on that basis alleges that if SPC obtains such connections, it will be carrying San Diego exchange service to a termination point at the American Airlines, Inc. switching arrangement in Los Angeles. From the termination point in Los Angeles, the foreign exchange service could be switched to any point on the American Airlines, Inc. private line network, both within the state and outside the state.

V

Service of the kind SPC intends to provide has consistently been regulated by this Commission

as intrastate foreign exchange service. It has not been treated as an interstate private line service.

VI

Pacific has been informed by the Chief of the Common Carrier Bureau of the Federal Communications Commissions that, in his opinion, Pacific is required to provide the connecting facilities requested by SPC.

VII

For the reason stated in Paragraph VI above, Pacific is in the process of establishing the connections requested b SPC. Pacific is establishing the connections only under protest, and without prejudice to its position stated herein, pending the final resolution of this matter.

VIII

Pacific alleges that SPC intends to provide intrastate foreign exchange service between San Diego and other points within California contrary to the certificate of public convenience and necessity granted to it by this Commission. The regulation of such service is within the jurisdiction of this Commission pursuant to Article VII of the California Constitution, the California Public Utilities Code, and Sections 2(b) and 221(b) of the Communications Act of 1934 (47 U.S.C., §§ 152(b) and 221(b)).

IX

Pacific further alleges that this Commission has recently asserted and exercised its jurisdiction over such service by issuing Decision No. 84167,

and that the actions of SPC in seeking to establish the connections described above are in direct and flagrant violation of the express prohibition contained in that decision. Ordering Paragraph 7 of that decision specifically prohibits any direct connection of SPC's private line circuits to the exchange network.

W h e r e f o r e, Pacific requests that his this Commission:

1. Set this matter for prompt hearing;

2. Determine whether SPC is offering a service contrary to this Commission's certification of public convenience and necessity, and if so, order SPC to cease and desist from making such connections with Pacific's exchange network; and

3. Take such further action as it deems proper.

Dated at San Francisco, California, June 6, 1975.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

By ARTHUR C. LATNO, JR.
Vice President

ROBERT V.R, DALENBERG
WILLIAM B. ROWLAND
By /s/ William B. Rowland
WILLIAM B. ROWLAND
Attorney for Complainant
140 New Montgomery Street
San Francisco, California 94105
415-542-2246

ARTHUR C. LATNO, JR., under penalty of perjury, certifies as follows:

He is an officer, to wit, Vice President, of The Pacific Telephone and Telegraph Company, a corporation, the complainant named in the foregoing complaint, and makes this verification for and on behalf of said corporation. He has read the foregoing complaint and knows the contents thereof and the same is true of his own knowledge, except as to those matters herein stated on information or belief, and as to those matters, he believes it to be true.

Dated at San Francisco, California, June 7, 1975.

ARTHUR C. LATNO, JR.

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF UNITED VIDEO INC., A CORPORATION, FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO OPERATE A TELEPHONE COMPANY TO SERVE THE TERRITORY WITHIN AND BETWEEN THE CORPORATE LIMITS OF THE CITIES OF TULSA AND OKLAHOMA CITY, OKLAHOMA.	CAUSE NO. 24892

COMPLAINT AND APPLICATION FOR EMERGENCY ORDER

1. Complainant herein is Southwestern Bell Telephone Company, a public service and transmission company duly authorized and engaged in the business of a telephone company within the State of Oklahoma and elsewhere. The Respondent to this Complaint, Southern Pacific Communications Company, is a public service and transmission company now authorized to provide point-to-point intrastate private line telephone service within and between the limits of the cities of Tulsa and Oklahoma City, Oklahoma, subject to the approval by this Commission of said Respondent's intrastate tariff.

2. Complainant is now providing certain customers in Oklahoma City with Tulsa, Oklahoma Exchange telephone service which service is termed "foreign exchange service" because it is terminated at the customer's premises within the Oklahoma City Metropolitan Telephone Exchange

which is owned and operated by Complainant. Similar foreign exchange services between points wholly within the State of Oklahoma are also now being provided by the Complainant.

3. The rates and charges for the said Tulsa, Exchange service, which is terminated at the aforesaid customer's premises within the Oklahoma City Metropolitan Telephone Exchange, and all similar intrastate foreign exchange services between points wholly within the State of Oklahoma are prescribed by the intrastate tariffs of Complainant as filed with this Commission.

4. The Complainant has been advised by Southern Pacific Communications Company, Respondent herein, that it will replace certain of the Complainant's existing intrastate foreign exchange services, now being provided by Complainant within the State of Oklahoma at rates and charges authorized and approved by this Commission, with foreign exchange services offered and provided by Southern Pacific Communications Company at rates and charges not authorized or approved by this Commission but at rates and charges authorized by the Federal Communications Commission for Southern Pacific Communications Company's interstate services.

5. The Respondent has demanded that the Complainant forthwith accept orders for local distribution facilities within the State of Oklahoma and for exchange service access lines within the State of Oklahoma which are necessary to the Respondent's provision of the aforesaid Tulsa Exchange service which will be terminated at customers' premises within the City of Oklahoma City. The Complainant, without waiver of any right to relief, claim or cause of action it may have in the premises

and with notice to Southern Pacific Communications Company that said services, in the view of the Complainant, are intrastate and exchange services which the Respondent is without authority to offer or provide within the State of Oklahoma, has informed the Respondent that it will accept and process the Respondent's orders placed with Southwestern Bell Telephone Company for local loops and exchange service access lines demanded by the Respondent for the aforesaid services until the Oklahoma Corporation Commission issues an order directing the Complainant not to provide such facilities or issue an order directing the discontinuance of the aforesaid service offerings within the State of Oklahoma by the Respondent, Southern Pacific Communications Company.

6. The Respondent has placed orders for local distribution facilities and for exchange service access lines to connect and provide the aforesaid services between points wholly within the State of Oklahoma and the said orders are being accepted by the Complainant subject to the aforesaid conditions and under the aforesaid protests with respect to the absence of authority of the Respondent to offer or provide any such services within the State of Oklahoma. The questions presented by the Respondent's offering and provision of the aforesaid services involves the public interest and the continuation of the existing jurisdiction of this Commission over the aforesaid services, the rates, charges and practices applicable thereto within the State of Oklahoma.

The Complainant prays that the Commission set this Complaint for hearing and that an Emergency Order be issued forthwith, without notice, maintaining the <u>status quo</u> by directing Southern Pacific Communications Company to cease and

desist from the offering or provision to the public within the State of Oklahoma of foreign exchange telephone service between points wholly within the State of Oklahoma and directing the Complainant to withhold the provision of exchange service access lines within the State of Oklahoma to Southern Pacific Communications Company for use in its provision of foreign exchange service between points wholly within the State of Oklahoma until hearing can be held upon this Complaint and the rights and authority of Southern Pacific Communications Company to offer and provide said services within the State of Oklahoma determined by final order. Upon public hearing, the Complainant prays that the Commission determine that Southern Pacific Communications Company is not authorized to offer or provide foreign exchange service between points wholly within the State of Oklahoma and that the said Respondent be ordered and directed to cease and desist the offering to the public within the State of Oklahoma of the aforesaid services pending authorization therefor as provided for by law.

SOUTHWESTERN BELL
TELEPHONE COMPANY

By /s/ Robert D. Allen
ROBERT D. ALLEN,
Its Attorney
707 North Robinson, Room 921
Oklahoma City, Oklahoma 73102
Telephone: 405/236-6751

CERTIFICATE OF SERVICE

On this 3rd day of June, 1975, a true and correct copy of the above and foregoing was mailed, postage prepaid, to Charles E. Norman, Rizley, Prichard, Ford, Norman & Reed, attorneys at law, 1100 Philtower Building, Tulsa, Oklahoma 74103.

/s/ Robert D. Allen

Decision No. 84167

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Complainant, vs. SOUTHERN PACIFIC COMMUNICATIONS COMPANY, Defendant.	Case No. 9728 (Filed May 1, 1974)
In the Matter of the Suspension and Investigation on the Commission's Own Motion of Tariffs filed under Advice Letter No. 1 by Southern Pacific Communications Company	Case No. 9731 (Filed May 17, 1974)
Application of SOUTHERN PACIFIC COMMUNICATIONS COMPANY for a certificate of public convenience and necessity to operate a telephone line between San Francisco and Los Angeles.	Application No. 55284 (Filed October 31, 1974)

Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to revise rates, charges and rate structures for intrastate voice grade private line service in order to establish a modified High Density - Low Density Service, referred to as an Exception Rate Service and to withdraw the High Density - Low Density Service proposal which was the subject of Application No. 54839.	Application No. 55344 (Filed November 26, 1974)

Robert E. Michalski and William Rowland, Attorneys at Law, for The Pacific Telephone and Telegraph Company, applicant, protestant in Case No. 9731, and complainant in Case No. 9728.

McCutchen, Doyle, Brown & Enersen, by William W. Schwarzer and Lynn H. Pasahow, Attorneys at Law, and Thormund A. Miller and Richard S. Kopf, Attorneys at Law, for Southern Pacific Communications Company, applicant, respondent in Case No. 9731, and protestant and defendant in Case No. 9728.

Richard D. Crowe, for Continental Telephone Company of California, protestant in Case No. 9731.

Kenneth F. Okel, Attorney at Law, for General Telephone Company of California, interested party.

Timothy E. Treacy, Attorney at Law, and Paul Popenoe, Jr., for the Commission staff.

INTERIM OPINION

These proceedings all deal with the proposed operation, intrastate, of a point-to-point microwave communications system by Southern Pacific Communications Company (SPCC) and, if the SPCC system is allowed to operate, the proposed competitive response on the part of The Pacific Telephone and Telegraph Company (Pacific).

History of the Proceedings

SPCC has constructed a point-to-point microwave telecommunications system, presently operating on an interstate basis pursuant to Federal Communications Commission (FCC) authority. The system is intended to provide various kinds of private line service to subscribers. The scope of the FCC authority and the physical description of the system will be discussed at greater length elsewhere in this opinion.

Intending to use this service for intrastate purposes, SPCC filed "Advice Letter No. 1" (Exhibit 6 herein) on April 15, 1974. This advice letter incorporated all the tariffs intended to go into effect for this system.

Pacific responded to this filing with its complaint to Case No. 9728 which alleges, upon various grounds discussed hereafter, that SPCC has no authority to operate such a system intrastate and that therefore there is no basis for the filing. Pacific concurrently filed a letter of protest to the tariff alleging the same grounds. SPCC moved to dismiss the complaint on May 8, 1974.

Case No. 9731 began with an Order of Suspension and Investigation of Advice Letter No. 1, filed by the Commission on

May 7, 1974. This order responded to protests by Continental Telephone Company of California (Continental) and Pacific, and summarized the grounds of those protests as follows: (1) SPCC has not applied nor been granted a certificate of public convenience and necessity for intrastate service, (2) no public need has been demonstrated for the establishment of SPCC's services, (3) SPCC has presented an inadequate showing of fully allocated costs of providing the service, (4) the proposed service is a duplication of service now provided by Pacific, and (5) SPCC's projected operating losses indicate inadequate showings of cost allocations and rate computations.

The Order stayed the operation and effectiveness of the tariffs to and including September 10, 1974. The Commission issued Decision No. 82904 on May 21, 1974 which denied rehearing as to the suspension, and also denied SPCC's motion for a dismissal of Case No. 9728.

On September 4, 1974 the Commission issued Decision No. 83412 which extended the period of suspension to and including March 10, 1975.

Application No. 54839 was Pacific's original competitive response to the tariffs proposed, should the Commission allow SPCC to enter the intrastate private line microwave communications field. Pacific later filed Application No. 55344 which contained modifications of the tariff structure proposed in Application No. 54839. Pursuant to the request of the applicant, Application No. 54839 was dismissed by Decision No. 84019.

SPCC filed Application No. 55284 on October 31, 1974. This application was filed "under protest" (paragraph 3 of application) and in conjunction with the motion to dismiss it. The

purpose of the application, without conceding the necessity for a certificate of public convenience and necessity, was to request such a certificate for intrastate operations, if the Commission ruled that one was necessary.

The cases were consolidated for hearing by various orders of the Commission or the examiner. Hearings were held before Examiner Meaney in San Francisco from December 9 through December 18, 1974, and on February 4, 1975.

We must decide certain issues by way of interim decision because the period of suspension for Advice letter No. 1 expires March 10, 1975. A final decision regarding rates and rate design requires additional briefing and will be postponed for further order of the Commission.

The issues to be considered in this interim decision are: (1) whether SPCC requires a certificate of public convenience and necessity from this Commission to commence intrastate operations; (2) if SPCC does require a certificate, whether it should be granted; and (3) whether, if SPCC is permitted to operate its proposed service intrastate, the private line tariffs of Pacific should be adjusted in any manner on an interim basis to maintain competition in the private line field.

We hold that a certificate is necessary and that, subject to certain restrictions, it should be issued. We further hold that, on an interim basis, Pacific's private line rates should not be changed but that SPCC's proposed rates should be adjusted to narrow the gap between the rates of the two companies for equivalent services.

I. NEED FOR A CERTIFICATE

Requirements under Public Utilities Code Section 1001:

SPCC concedes it is a "telephone company" within the meaning of Public Utilities Code Section 1001[1/] but argues it needs no certificate to operate

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1/ All code references are to the Public Utilities Code unless otherwise specified. Section 1001 reads in part as follows:

> "1001. No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, water corporation, or sewer system corporation, water corporation, or sewer system corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.
>
> "This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street

(cont. p. 51)

its system because Section 1001 regulates construction and not operations.

SPCC first invites a comparison with Sections 1007 (for-hire vessels) and 1063 (highway carriers)

1/ (cont. from p. -50-)
railroad, or line, plant, or system, and not theretofore served by public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission, on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

"The commission, as a basis for granting any certificate pursuant to the provisions of this section shall give consideration to the following factors:

"(a) Community values.
"(b) Recreational and park areas.
"(c) Historical and aesthetic values.
"(d) Influence on environment."

since these sections refer to operation while 1001 does not. This comparison is irrelevant since it would be meaningless from a regulatory standpoint to attempt to control the "construction" of vessels or of vehicles intended for highway carriage.

SPCC next cites Loperena v. Fresno Mobile Radio, Inc. (1970) 71 CPUC 645 as proof, that the Commission has already decided this issue in its favor since no certificate was required where the utility was able to provide the questioned service without additional construction. This case, however, involved a company already possessing valid intrastate authority and merely dealt with whether a one-way paging service was within the scope of the radio telephone utility's two-way operating authority. This opinion is not dispositive of the issue here.

The relevant cases show that this Commission has consistently enforced the certificate requirement to preclude expansion of operating rights through tariff filings or otherwise extending service without authorization. (Cf. Motor Transit Company (1924) 24 CRC 807; Auto Transit Co. v. Pickwick Stages (1927) 30 CRC 32; Los Angeles and San Pedro Transp. Co. v. Richards Trucking and Warehouse Co. (1927) 30 CRC 49; and Blair v. Coast Truck Line (1922) 21 CRC 530.)

In Valley Natural Gas Co. v. Midway Gas Co. (1917) 13 CRC 313, defendant offered to sell gas to consumers in complainant's territory and argued it had a franchise from Kern County to construct and operate gas mains and would require a certificate under Section 50 (present Section 1001) only if it should make an extension of its system. The Commission said (p. 318):

> ". . . defendant's interpretation of Section 50 of the Public Utilities Act, by which it assumes that a utility can take on consumers even though they are located within territory exclusively supplied by another utility, provided that in so doing it does not extend its physical plant or system, is not proper. The intention of this provision of the act is clear -- to prevent unregulated extension into territory already served. . . . If defendant's position in this matter were correct, a utility could evade regulation and by the more juggling of titles accomplish indirectly that which is not legally permissible by direct means."

A similar result was reached in Dyke Water Company (1957) 56 CPUC 109 (113):

> "Applicant has, in this manner, ignored and violated the provisions of the first paragraph of Section 1001 of the Public Utilities Code in that it had begun the construction of a water system in said tract 3182 'without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.' Applicant has no justification for presenting the accomplished fact as the basis for its application for the issuance of a certificate of public convenience and necessity by this Commission. Applicant has heretofore been alerted against this practice, and it is here again put on notice of the provisions of the law, violations of which will not be tolerated by this Commission."

(Cf. Magalia Water Company (1941) 43 CRC 716 which denied a certificate despite prior construction of a water system, and PT&T Co. v. Cal. Valley Mutual Tel. Co. (1964) 63 CPUC 65.)

In considering this question, it is important to remember the purpose of a certificate, which was succinctly stated by the California Supreme Court in Motor Transit Co. v. Railroad Commission (1922) 189 Cal. 573, 580:

> "The certificate of public convenience and necessity is the means whereby protection is given to the utility rendering adequate service at a reasonable rate against ruinous competition. The person or corporation obtaining a certificate must operate at the times and in the manner prescribed by such certificate, thus furnishing uniform and efficient service to the public. If anyone else would be at liberty to operate without such a certificate he might operate at his own pleasure and only under favorable conditions, thus making it impossible for the holder of a certificate to successfully carry on his business. It is the public interest in efficient service which is being safeguarded by the requirement of a certificate. (Oro Electric Corp. v. Railroad Commission (1915) 169 Cal. 466, 475 [147 Pac. 118]; Public Utilities v. Garviloch 54 Utah, 406 [181 Pac. 272, P.U.R. 1919E, p. 182].)"

Pacific's fears as to what the situation would be if this purpose is not observed are not groundless. An exception to certification requirements

would be created which would be almost as large as the rule. Previously constructed private communications systems could be placed in public service with no control except over service and rates. A system constructed without even color of any lawful purpose could be dumped into the Commission's lap, with no way for the Commission to evaluate public need via the certification process.

SPCC's interpretation, if anything, directly invites subterfuge. It must be well remembered that SPCC is not the only specialized communications common carrier in existence, that the evidence is undisputed that the market for such specialized services is growing, and that we can expect more applications in this field. SPCC's interpretation of Section 1001 is an invitation to partial deregulation and general confusion which, as a result of our order herein granting a certificate to SPCC, would work as much mischief against SPCC as against Pacific.

We agree with Pacific's contention that Section 1001, in speaking to "lawfully commenced operations" and in providing that construction which will interfere with the "operation of the line, plant, or system of any other public utility" may be made subject to reasonable terms and conditions, shows that its drafters considered construction and operation interwoven. The particular language of the first paragraph of the section, when read with the whole section, must be taken to emphasize the time when application for a certificate should be made rather than to separate construction from operation and to create the kind of exception claimed by SPCC.

In so interpreting Section 1001, we recognize that there are situations where a system may be

lawfully constructed without a certificate for purposes other than intrastate public utility service, but it is clear from our review of the purposes of Section 1001, that even in such event, a certificate from this Commission is necessary prior to commencing intrastate public utility operations.

We need not consider arguments regarding whether, assuming the inapplicability of Section 1001, Section 1002 would then apply.

SPCC's Interstate Authority

SPCC next argues that the FCC authorized both interstate and intrastate service over its line, and that therefore this Commission has no jurisdiction to consider certification. We reject this contention.

We are well aware of general principles of federal supremacy under Gibbons v. Ogden (1824) 9 Wheat. 1, 6 L.Ed. 23 and derivative cases, but in determining the applicability of such supremacy, we must look to what authority was given to the FCC by Congress. FCC v. American Broadcasting Co., Inc. (1954) 347 US 284, 98 L.Ed. 699; G.T.E. Serv. Corp. v. FCC (2d Cir. 1973) 474 F.2d 724; American Tel. & Tel. Co. v. FCC (2d Cir. 1971) 449 F.2d 439; Sterling Manhattan Cable Television, Inc. v. New York Tel. Co. (1973) 38 FCC 2d 1149.

In the Communications Act of 1934 (Act), Congress clearly reserved to the states exclusive jurisdiction over intrastate communications services. Section 2(b) of the Act states, in pertinent part:

"Subject to the provisions of Section 301[2] of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier..." (47 U.S.C. § 152(b).)

The legislative history of the Act underscores Congressional intent that such jurisdiction is reserved to the states. The Senate report accompanying the bill which became the Act explains Section 2:

"Section 2: Provides that the act is applicable to the regulation of all radio stations and to interstate and foreign communication, but reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication." (S. Rept. 78, 73d Cong., 2d Sess., p. 3.)

When Section 2(b) was amended in 1954, the Senate report accompanying this amendatory legislation incorporation the following comments of the FCC:

"This bill would amend Sections 2(b), 3(u) and 221(b) of the Communications Act to further clarify the jurisdiction of the Commission with respect to the common carrier regulation of certain communications activities. Specifically, it would amend Section 2(b)(1) of the act

2/ Concerning radio licenses.

to make explicit that intrastate communication service, whether 'by wire or radio', will not be subject to the Commission's jurisdiction over charges, classifications, practices, services, or facilities."

* * *

"The present proposal represents the joint efforts of the Commission, the United States Independent Telephone Association and the National Association of Railroad and Utilities Commissioners to clarify the extent of Commission common carrier jurisdiction in circumstances where radio facilities are used by such carriers in lieu of wire lines and where, under the existing language of the Communications Act, it would be clear that the Commission would not have regulatory jurisdiction over the services in question had they in fact been conducted by wire." (S. Rept. 1090, 83d Cong., 2d Sess., 1954, U.S. Code Cong. & Admin. News pp. 2133, 2135-2136.)

Case law repeatedly recognizes state jurisdiction over intrastate communications. (Radio Telephone Comm., Inc. v. Southeastern Tel. Co. (Fla. 1965) 170 So. 2d 577; Doniphan Tel. Co. v. A.T.&T. (1962) 34 FCC 950; aff'd. (1963) 34 FCC 1963; Mobile Radio System of San Jose, Inc. v. Vogelman (1969) 69 CPUC 333, 336.

The California Supreme Court recognizes our jurisdiction over intrastate communications. The court said, in Com'l. Communications v. PUC (1958) 50 C 2d 512, 526 [cert. den. 359 US 341]:

"The respondent commission held that the provisions of section 2, subdivision (b) and section 3, subdivision (e) of the Communications Act of 1934 as amended (47 U.S.C., Sections 152, 153) make it clear that the federal commission has no jurisdiction, except under the radio licensing provisions of the act, over intrastate communications service by radio, and that 'interstate communication by radio' does not include communication between points in the same state if such communication is regulated by a state commission. . . . The commission's ruling would appear to be correct."

SPCC's reliance upon Postal Telegraph-Cable Co. v. Railroad Commission (1927) 200 Cal 463, for the proposition that intrastate certification would here inhibit federally granted authority, is misplaced. This case decided, under the federal acts with which it was concerned, that a state certificate could not be required for construction of a certain telegraph line. Postal Telegraph-Cable Co. was operating pursuant to a federal franchise under a Congressional Act of 1886 which specifically precluded exercise of state authority. Since this act implemented the constitutional grant of power to Congress to establish post offices and post roads (Art. I Sec. 8), the court held that Postal Telegraph-Cable Co., in exercising its franchise "became an agency of the federal government for the transaction of its postal business" (200 Cal at 469.[3]

3/ (See p. -60-)

The FCC's power to grant certificates is derived from the commerce clause and not the postal clause. SPCC is not an instrumentality of the Federal Government under the Act. The petitioner in Postal Telegraph relied on this very distinction in its opening brief (p. 16):

"Unlike the Commerce Clause, the power of the National Government to establish post offices and post roads is not so limited as to exclude authority over communications which are purely intrastate. The authority of the National Government, under the Federal Constitution, covers the entire field of postal communications - intrastate, as well as interstate and with foreign nations."

SPCC counters by arguing that the point involved is not the source of the federal authority but its effect (reply of SPCC to Pacific's brief in opposition to rehearing, filed June 1, 1974, p. 10). This proposition cannot stand. Sources of constitutional power must be considered in

3/ SPCC argues that respondent in Postal Telegraph (the Railroad Commission) conceded that the State could not require a certificate as a prerequisite to constructing an interstate line even though potentially usable for intrastate purposes, and that therefore it is immaterial whether Pacific is correct in distinguishing Postal Telegraph from the present situation. This argument overlooks the fact that the concession was made with the particular statutes then in effect in mind and not while considering the present Communications Act of 1934.

determining the effect of federal statutes enacted under various clauses of the Constitution. This has ever been the rule. As the U.S. Supreme Court stated long ago:

> "That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
>
> "This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> "The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

> The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act." (Marbury v. Madison (1803) 1 Cranch 137, 2 L ed 60, 73; emphasis added.)

Reliance on Postal Telegraph is, for the reasons stated above, inappropriate. There is, additionally, a strong presumption against federal pre-emption of state authority. Maurer v. Hamilton (1940) 309 US 598 84 L ed 969; California v. Zook (1949) 336 US 725, 98 L ed 1005; Head v New Mexico Board of Examiners (1963) 374 US 424, 10 L.Ed 2d 983.

SPCC maintains that the "only apparently relevant restriction" on the FCC's authority is found in Section 152(b) of the Act, which provides:

> "Subject to the provisions of Section 301 of this title [governing radio transmissions], nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier. . . ." (Emphasis added.)

SPCC claims that since this section deals only with regulation of authorized service and not

certification, state jurisdiction to regulate charges and service is saved, but the FCC's power to authorize construction and operation of lines is in no way limited. It is claimed that Section 214 governs construction and operation of lines and the specific language of Section 214(c) makes it clear no other approval is necessary.4/

The short answer to this argument is that Section 152(b) by its own language is an express limitation on the entire Act. The phrase "in this chapter" in Section 152(b) can refer to nothing other than Chapter 5 of Title 47, U.S. Code (entitled "Wire or Radio Communication") which includes Sections 151 through 609.

The FCC was well aware of the limits of its jurisdiction and did not grant SPCC a certificate for interstate and intrastate operations. After SPCC's West Coast applications had been filed with the FCC, petitions were filed to deny the applications. One ground urged was that state certificates were required as a condition precedent to providing the intrastate service SPCC was apparently considering. SPCC denied this, stating:

4/ Section 214(c) reads, in part:

> "After issuance of such certificate [of public convenience and necessity applied for under Section 214(a)] . . . the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction [and] operation . . . covered thereby." (Emphasis added)

> "Southern Pacific's applications seek only interstate authority from the Commission to provide a fully viable interstate operation. Should Southern Pacific also determine to provide intrastate service, it will submit appropriate applications for intrastate operations to the state authorities having jurisdiction, but its pending applications to this Commission in no way rely upon or require the grant of any intrastate authority." (Opposition to Petitions to Deny Applications of Southern Pacific Communications Company For Construction Permits for a Fixed Point-to-Point Microwave Radio System between Seattle, Washington, and San Diego, California, and Intermediate Stations, File Nos. 4502-C1-P-70 through 4558-C1-P-70, p. 17, emphasis added.)

SPCC later submitted to the FCC a letter from our staff addressed to SPCC dated January 10, 1972 which stated in part:

> "This is in response to your letter of January 6, 1972 inquiring as to the necessity of securing from the California Commission a certificate of public convenience and necessity prior to commencing construction in 1972 of the first segment (San Francisco-Los Angeles) of an interstate specialized communications common carrier system extending from Seattle to San Diego and from Los Angeles to East St. Louis, Illinois..."
>
> * * *

"On the basis of the foregoing representations and the federal statute referred to it is concluded that it is not necessary that you file a separate application for a certificate of public convenience and necessity from this Commission for authority to commence construction of the San Francisco-Los Angeles segment of the *interstate line.* *It will be necessary, however, to file a tariff with this Commission before operations commence, to establish rates for intrastate communication services performed with the subject facilities."* (Emphasis added.)

"The foregoing is an informal expression of staff opinion. The Commission itself does not issue opinions except after formal proceedings."

SPCC seizes upon this letter to claim that regardless of whether the last sentence of the second paragraph is correct, it "opened the way" to a grant of unrestricted (i.e., interstate/ intrastate) operating authority. SPCC would in effect give this letter the force of a decision binding on the Commission. Even without the last paragraph disclaimer, there is no basis for this.

In any event, it is unreasonable to interpret the FCC Memorandum Opinion and Order which followed[5/] as granting such authority. The issue

5/ See p. 66.

before the FCC was whether state authority was necessary as a condition precedent to exercising *intrastate* authority it *apparently* sought (which caused SPCC, as mentioned, to deny it sought such authority). Paragraph 5 of that FCC order, addressed to this particular issue (and certainly not to the issue of whether the FCC had the power to, and therefore should, issue intrastate authority notwithstanding state requirements) reads:

"5. With respect to the need for state authorization, SPCC has submitted a staff letter from the Public Utilities Commission of California which states that application for a state certificate is not required for construction of the Los Angeles - San Francisco segment of the proposed Seattle - San Diego system, and that intrastate service may be commenced upon the filing of a tariff with that Commission. We conclude, therefore, that neither of these questions raised by General poses any problem."

To the extent that the staff letter indicates that no certificate from this Commission is necessary to commence intrastate operations, it is

5/ *In re Applications of Southern Pacific Communications Company*, File Nos. 4532 et al, adopted September 13, 1972 (Exhibit "A" to SPCC's Motion to Dismiss Complaint in Case No. 9728).

in error. But the only effect of that error insofar as the FCC's order was concerned was to cause the FCC to rely upon misinformation in disposing of the precise issue in front of it. It did not cause the FCC to issue a certificate for intrastate service binding upon this Commission (or, for that matter, to issue <u>any</u> intrastate certificate, binding or otherwise).

<u>Existence of a Separate Intrastate System</u>

SPCC argues that no specific intrastate system was constructed or is planned and that there is, in effect, nothing for us to certificate.6/ We do not agree.

Preliminarily, we believe it is clear that SPCC's system includes "lines" within the meaning of Public Utilities Code Section 1001. Section 233 defines lines to include:

> ". . . all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property <u>owned, controlled, operated, or managed</u> in connection with or to facilitate communication by telephone, whether such communication is had with

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6/ We do not question, nor is there any issue over the FCC's exclusive jurisdiction to assign radio, including microwave frequencies, under Title III of the Act.

> or without the use of transmission wires." (Emphasis added.)

SPCC's intrastate connections are "lines" within this definition. They will be composed of channel segments of their own and of other carriers. SPCC would, as far as traffic is concerned, "control, operate, and manage" these segments. Therefore, SPCC cannot logically claim it built nothing but an interstate system. To argue that "but for" the interstate system tha intrastate lines would not exist is to ignore both the history of SPCC's system and common sense.

Nor is it necessary to be able to physically identify or separate pieces of the system.7/ No telephone corporation would ever build tandem interstate-intrastate systems. The waste involved would be monumental. The "lines" must be regarded as they would in any telephone company, from a point of view of their usage and allocation, and the lines such segments would form.

Pacific apparently invites us to make a line-by-line analysis. This would be pointless, since the usage of any particular line could change from time to time. For example, a customer could originally wish interstate service

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7/ Nor should SPCC be put to the work of filing applications for each "line". Our certificate will specify a service territory.

and later request an intrastate connection, or vice versa. We must analyze the system as a system.

The testimony of SPCC's witness Hunich and the remainder of the evidence shows that SPCC overbuilt the system from the start to anticipate the total California demand, interstate and intrastate. There is no basis for regarding intrastate service as an afterthought,[8/] and the only inference which may reasonably be drawn from the history of SPCC's system is that it was always the objective of SPCC to allocate a substantial portion of its plant to intrastate demand.

8/ Although the question is not directly presented, even if the intrastate use of the system were an afterthought, it would still be subject to certification. As we stated, Section 1001 must be read as a whole. Its first paragraph does not create a loophole and is designed to stress the time when an application should be made. There is no basis for any argument that the Act, which reserves state authority over intrastate communications, mades such reservation except for systems which were originally interstate.

II. THE APPLICATION FOR A CERTIFICATE

Specialized Communications Carriers - General Considerations

As mentioned, SPCC filed Application No. 55284 "under protest" requesting the Commission to dismiss it if no certificate were required, and to issue a certificate if necessary. Pacific, and General Telephone Company of California (General) protest the grant of a certificate.

The testimony of the policy witnesses for General and Continental Telephone Companies indicates a desire for us to adopt a policy of excluding specialized carriers. A discussion of the general problem of such entry is essential.

We believe that a policy which categorically forbids entry of specialized carriers would be contrary to our duty to protect the public interest, and would fail to consider actual and potential anticompetitive aspects of a developing market. In Northern California Power Agency v. PUC (1971) 5 Cal.3d 370, 96 Cal.Rptr. 18, it was held that this Commission must consider anticompetitive facets of applications before it. (Cf. Phonetele, Inc. v. PUC (1974) 11 Cal.3d 125.) We hold that the Commission must consider applications for specialized entry into the California intrastate telecommunications field on an individual, case-by-case basis, and cannot adopt a policy of categorical exclusion of such carriers. This is not to say, of course, that we may not deny particular applications, in whole or

in part, or grant them subject to whatever conditions are appropriate, when such a course of action is in the public interest. After such entry is allowed, the Commission must of course exercise its regulatory powers to protect the public interest and assure competitive fairness.

Additionally, while we are not bound to follow policies enunciated by the FCC, we should consider such policies carefully and take notice of major nationwide developments in the industry. Recent actions of the FCC show that that agency has relaxed the principle of regulated monopoly in favor of allowing limited competition. The FCC has found that the waste, if any, in duplication of facilities was found to be outweighed by the advantage of offering certain classes of consumers a choice. 9/ The FCC has decided that:

> "... a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity." (29 FCC 2d at 920).

9/ On the development of the specialized telcommunications industry generally, through 1971, see "Specialized Common Carriers" by Philip M. Walker and Stuart L. Mathison, October 15, 1971 edition of Telephone Engineer and Management.

This determination was attacked in Washington Utilities and Transportation Commission v. FCC, and a companion case, National Association of Regulatory Commissioners v. FCC, (USCA, 9th Circ., Nos. 71-2919 and 72-1198, respectively). The court issued an extensive opinion on January 20, 1975, which inter alia, upheld the FCC in this policy determination.

At least one state has now adopted such a policy on an intrastate basis (United Video, Inc., Oklahoma Corporation Commission, Cause No. 24892, Order No. 108727 dated November 14, 1974).

The FCC has relied in part on the fact that there is an ever-growing market for specialized communication needs, and has reached the conclusion that competition would stimulate "rapid introduction of new technology" (Establishment of Policies, etc., Docket No. 18920, First Report and Order, released June 3, 1971, paragraph 35). The evidence in our proceeding shows a rapidly growing private line market (about 10 percent per year) ever since World War II. We should not adopt a flat policy which might have the effect of retarding technological advances in the California intrastate telecommunications market.

We note in this connection Pacific's argument that an applicant seeking to "invade territory served by an existing utility must sustain the burden of proof that the existing utility either is not providing or cannot provide adequate service within that territory" (Pacific's brief

opposing certification, citing San Gabriel Valley Water Company (1950) 50 CPUC 406; Washington Water & Light Co. (1947) 47 CPUC 280, S.C. Brooks, et al. (1932) 37 CRC 672; and California Pacific Utilities Co. (1960) 58 CPUC 278).

These cases relate to a situation where the "invasion" concerned competition for service generally within the territory. We have a new situation here which does not fit the mold of traditional "inadequacy of service" cases. In an area where rapid technical advancements can be made, and new and different specialized services may be offered, to apply the traditional "inadequacy of service" concept would be to place the Commission in the position of having to find inadequacy as to an existing service before it allowed a new service to begin. This would be an illogical approach, since the market for a new service is not always firmly established and there is not a 100 percent relationship between the demand for the existing and the new services (concededly, there may well be an overlap in demand between an existing and a new service when the new service is not totally different).10/ Strict and literal adherence to such a theory would mean no new services could be certificated until the existing ones were being furnished inadequately.

10/ We believe that counsel for SPCC's "concession" regarding adequacy of service (tr. 268) must be taken in this light.

SPCC's Proposal

We turn now to specific arguments relating to issuance of a certificate to SPCC for the services it proposes. We believe the preponderance of the evidence shows that, while not 100 percent novel, the services proposed are different enough to be considered innovative. One hundred percent novelty is not required. We also believe that public demand has been demonstrated.

The testimony of C. Gus Grant, president of SPCC, presented a general picture of the development of the company. The interstate network, presently operating under FCC authorization, begins at San Francisco, goes through Los Angeles, then leaves the state, eventually terminating at points in the East. The microwave transmission system employed by SPCC is also used by all other telecommunications carriers for intercity toll circuits. SPCC's microwave system was originally conceived for use in connection with transportation operations of Southern Pacific Company (later transferred to Southern Pacific Transportation Company).

The service consists basically of (1) intercity channels of various bandwidths and data speeds for either analog or digital signals, including measured time service, (2) network terminals, and (3) local distribution facilities. SPCC will offer only private line service, not standard telephone exchange-type service; that is, one of its customers could not call to another SPCC subscriber (unless a specific separate private line for that purpose was

arranged).

The proposed rates (discussed hereinafter) are considerably below Pacific's. The witness felt that, primarily, SPCC's business will not result from diversion from Pacific but from new business because of the types of service offered. The witness conceded that there is no technical or engineering reason why Pacific could not provide the services offered by SPCC; however, Pacific is not providing these services at present. The "network terminals" will be provided to customers for special applications such as video. The distribution facilities are "local loops" rented from the appropriate telephone company. If service were requested where there were no existing distribution available from a telephone company, what would be done to connect the customer to the system would depend upon the size of the customer, but he said the most readily available solution would probably be a microwave circuit.

He stated that the facsimile transmission (FAX) services proposed to be offered are superior to those in existence because they are part of a complete package and not offered as a do-it-yourself project. SPCC will do all the maintenance and the entire package will be available on a rental basis. The witness conceded that Advice Letter No. 1 did not contain the FAX tariff or other intrastate tariffs for

some of these services.[11/]

The coast-to-coast transmission-of-data system was described as similar to the digital data service offered by the Bell System in seven cities in the east, but not in this area. SPCC has filed a tariff with the FCC to offer this particular service, interstate, from coast-to-coast.

The witness indicated that while surveys were done concerning the "routes of commerce" in the State of California (meaning the main and most heavily traveled routes which coincide, in the witness's opinion, with Southern Pacific's railroad lines) no surveys were done for the purpose of establishing the need for this service in other areas. He stated he considered the fact that the interstate customers are buying the service indicates that it would succeed on an intrastate basis. The witness gave considerable weight to the advantage of furnishing one customer with both inter- and intrastate communications service in one package.

11/ Advice Letter No. 1 does not contain complete descriptions of the services offered and described in Exhibits 15 and 16. Since SPCC based much of its argument on the public need for such services, this is a major deficiency. We will order SPCC to file a report on these services, in order that we may, by subsequent order, require SPCC to augment its tariff filings.

The incremental cost, he said, would be small, and admittedly if SPCC were required to serve the whole state, as is done by Pacific, this would present a different incremental cost picture. He denied, however, that the benefits available to the persons living in the area to be served would have a negative effect on those outside this area (that is, those served by Pacific in areas in which SPCC would not be competing). He explained that the communication business as a whole is growing, and denied that the growth in favor of specialized systems would be primarily at the expense of message telephone service (MTS) or wide area toll service (WATS). While private lines have certain advantages, customers would still need MTS and WATS lines for other purposes. His opinion was not based on any specific study showing what shift there would be from MTS or WATS service to private line service. The studies for these new services were based on what the witness called "value pricing" and not upon a comparison with Pacific's tariffs.

The witness felt that there would be no significant diversion (meaning less than one percent) from regular message toll service, since customers still have a need to call other destinations besides those which would be on the private line. He stated that in the interstate operation, while there was not a completely consistent pattern, most customers would take the private line service but keep WATS and MTS.

The witness stated that 60 percent of its interstate service backlog was for service not

offered in Bell System tariffs. SPCC's chief marketing targets are customers with multi-plant or multi-office operations who would need private lines. The witness did not know how many of these customers are or were Bell private line customers.

The witness felt that if the rates of Pacific and SPCC were exactly the same, SPCC could compete on quality alone except for the problem of a catastrophic loss, since in Pacific's system it is possible to reroute the signals in such an instance.

He reiterated his belief that the primary impact of the service would be to generate new service and not simply to divert business from Pacific. SPCC's average customer, he said, will not discontinue Pacific's toll service because SPCC's service is point-to-point.

John N. Albertson, a vice president and general manager with SPCC, furnished the Commission with a technical description of the system.

The microwave equipment is solid state and of the latest designs. Towers are spaced at varying lengths between 20 and 75 miles apart. If commercial power fails, emergency standby generators provide power for periods up to two weeks. If the standby generators also fail, the radio and multiplex equipment will operate from batteries for a period of up to eight hours.

At the terminals, the system is interconnected to local telephone terminals for distribution to the customer. If the customer requires substantial bandwidths or a large number of telephone channels, SPCC would furnish microwave communications to the customer's premises.

As Mr. Hunich had testified, no additional equipment will be necessary to commence intrastate operations. The system is now built to capacity with 1,800 channels, several hundred of which are now in use. Connection to the system is similar to connecting any new telephone service -- wires are simply connected between SPCCC's terminal block and Pacific's terminal block.

The system was "overbuilt" from the start in order to allow for expansion at the least possible cost. The deign criteria were similar to that for the Southern Pacific Transportation Company. Since the interstate network started functioning, experience has indicated a 99.96 percent error-free system. In designing the system SPCC attempted to exceed the Pacific's standards for noise control, and the witness believed that SPCC's "space diversity" system gives slightly better performance than the Pacific's microwave system. The design criteria also included raising certain tower heights and providing high performance antenna in certain areas. After investigation, frequencies were adjusted to avoid conflicts with other microwave users.

The system is continuously monitored by a computer-controlled alarm system. The company maintains a staff of technicians for maintenance and repair, and also contracts for certain services in this connection.

John J. Geier, SPCC's vice president, Western Area, furnished the Commission with a description of the various services and what SPCC believes to be their marketing advantages. According to this witness's testimony, there are two basic facets of SPCC's service: (1) customized channels or transmission facility service and (2) innovative communications service. The objective is to provide the customer "with services that precisely match his requirements." This is possible since SPCC would specialize in private line service and would be better able to take into account the needs of each customer, according to the witness. He summarized examples of service which could be provided, as follows: (Exhibit 13, Answer 10).

"1. SPCC will provide a facility during a specified time frame and meter the use of that facility to determine total charges. This is called Scheduled Metered Time Service.

"2. SPCC allows as many subscribers as can cooperate successfully to share a communications channel.

"3. SPCC allows a mixture of different bandwidths in the same channel.

"4. Duplex operation (simultaneous two-way transmission capability) is standard at SPCC, so no extra charge is made for this service.

"5. SPCC has no restriction on the simultaneous use of a channel for more than one purpose. For example, SPCC permits voice-plus-data transmissions on a single voice-grade channel.

"6. SPCC does not restrict interconnection with a private microwave system of a customer or other carrier. Only when SPCC must lease facilities from Pacific will there be a restriction on our customers, the restriction imposed by Pacific.

"7. SPCC has no restriction on the interconnection of customer owned equipment, and does not require the installation of special coupling devices.

"8. SPCC allows customers to colocate equipment on its premised, including its towers."

In addition, he said, SPCC has announced, and in the near future will file tariffs concerning these additional services:

"1. A sub-minute, controller operated, multi-point facsimile system. This

is a packaged offering including equipment, service and maintenance and there is not now a similar offering by any common carrier in the industry.

"2. Videovoice service. This is a packaged service consisting of slow scan video equipment coupled with adequate communication channels to multi-points in a customer organization. The package includes an SPCC maintenance agreement."

The witness thought that these new services would primarily generate new private line business, rather than accomplish diversion from Pacific. He stated: "Pacific has a built-in competitive advantage, because everyone must deal with the telephone company. Not everyone will be willing to split their communications business between two companies. Those willing to do so would be primarily users who are unable to fill their communication needs through Pacific's offerings."

He stressed that because of SPCC's relatively unknown position in the communications field, positive promotional steps were being taken to acquaint potential customers with the services, and that in his opinion this contrasted to Pacific's approach which simply acquaints the customers with the available tariffs. The biggest problem in promotional efforts, he stated, was lack of intrastate tariffs to match the interstate offerings. Customers are frequently unwilling to divide their business

between inter- and intrastate, and they cannot be informed definitely of what tariffs will be placed in effect.

Mr. Geier stated that he was aware that Pacific had a measured time service in operation for 38 years but recently withdrew it. In his opinion, this was caused by the pricing policies and certain other restrictions in the tariff.

The witness stated it was not his position that it would be impossible for Pacific to provide such innovative services but simply that they are not doing so. He was aware of the Pacific tariff entitled "Special Assembly Services on Channels for Miscellaneous Experimental Purposes" (Tariff 111-T) and also a tariff providing for special assemblies of equipment (Tariff 83-T). These tariffs, in the witness's opinion, provided alternatives for large customers but not for small customers. The witness defined a small customer as a business customer having three, four, or five message toll lines, and one with a sales volume of $50 million or less. (From the testimony of the public witnesses which will be discussed later, it does not appear that Pacific is using the above mentioned tariffs on a promotional or competitive basis.)

The corresponding interstate tariff for measured time service (Exhibit 20) contains a 10-hour-a-day schedule and eliminates a 2-hour-a-day schedule "due to lack of demand". The witness was nevertheless of the opinion that there is an intrastate demand for a 2-hour schedule, based upon customer contacts.

The witness was aware of certain competitive producst of Pacific such as digital data service. He stated that he considered this service a competitive response to similar systems offered by small competitors since the technology to introduce it was available for a long time. He characterized "hi-pak" (bulk pricing of large groups of communications facilities) as a competitive response to competition in the private line field as well.

For a summary, Mr. Geier presented Exhibit 23 which outlined all the services offered by SPCC which in his opinion were innovative. He had estimated the demand for these services based upon a rate structure similar to that allowed by the FCC, which rates are considerably below those of Pacific for the closest type of service. He was not prepared to state what the effect would be if the rates were to be the same as those of Pacific.

Gerry A. Young, manager of Rates and Economic Analysis for SPCC, testified regarding the rate structure, which he described as fully compensatory. The "required net income" was calculated on the basis of a 12 percent return on the average investment of SPCC over its depreciable life, using a straight-line method of depreciation. The allocations to the California system were made on a usage basis with the exception of depreciation, interest, ad valorem taxes, maintenance and operation, and marketing expense. The maintenance and operation reflect, generally, charges applicable to California specified by

agreement between SPCC and Southern Pacific Transportation Company. Regarding marketing, the allocation was made on a revenue basis on the assumption that the magnitude of the marketing effort is proportionate to the revenue to be derived.

The witness projected a profitable total California year in 1975 although the return would be only 3.7 percent. The intrastate portion of the California operation, however, was forecasted to show a $25,000 surplus over the revenue necessary to earn a 12 percent rate of return. He stated that the reason for this difference is that the intrastate channels in 1975 show a higher revenue per channel mile than the interstate channels, primarily because the preponderance of bulk traffic (that is, traffic sold in quantity at lower mileage rates) is interstate.

The attachments to the witness's prepared testimony (Exhibit 16) show that in his opinion total California profitability will be reached in 1976 and that there would be about a $10,000 overall loss in 1975 based upon the rate structure proposed.

The witness later produced Exhibit 58, a forecast of net income, which shows a predicted company-wide loss for 1975 (a negative rate of return of minus 6.66 percent). The witness explained that this would be due primarily to the fact that much of the system in the eastern states would still be under construction for that year.

The company began California interstate operations in the last month of 1973, for which

period there was a negative rate of return. The witness explained he expected a negative 1974 rate of return but had not calculated it specifically yet. The witness stressed that for California intrastate operations, the cost sheets attached to his Exhibit 16 were prepared on a fully allocated and not an incremental basis.

Several public witnesses testified in support of SPCC's California intrastate operation. The witnesses stressed the advantage of being able to buy only as much time as needed for private line activity and to select hours of the day. Some of the witnesses spoke in favor of the various combinations to be offered.

All of the witnesses favored competition in the communications industry because they thought it would mean more aggressive marketing of new approaches to communications. The witnesses indicated that they had been offered either very little or no explanation of the previously mentioned Pacific tariffs relating to special packages or experimental communications combinations.

Some of the witnesses indicated that price was the primary or exclusive consideration while others indicated that even if the rates were the same as Pacific's, they would still subscribe to one or more SPCC's offerings if a certain communications problem would be solved. For example, the communications manager for Air California testified that presently Air California uses MTS and WATS service for regular and special reservations functions. The private lines are shared and billed through Aeronautical

Radio Incorporated (ARINC) which acts as an agent for many airlines in acquiring communications channels, so that the channels can be shared. With the present Pacific connections, when using a foreign exchange service there is a 12 db loss which causes problems in communicating. Pacific has constantly worked on the problem but it apparently cannot be completely solved due to design limitations. The service which could be supplied to Air California through ARINC by SPCC, in addition to being less expensive, would apparently rectify this voice problem.

Other public witnesses, primarily interested in ordinary private line service on less than a full-time basis, explained that it would be more cumbersome to split their communications business between two carriers if there was no price advantage.

A representative of the Tele-Communications Association representing businesses of various sizes and individuals primarily in California and other western states, introduced a resolution of that organization supporting SPCC's application, and explained that this resolution was the result of a membership vote at a general meeting.

Pacific's Protest and Proposed Competitive Response

Pacific opposed the granting of a certificate and took the position that if it is granted the rates for SPCC's services should be set at

levels which would be the same as those of Pacific, or in the alternative, that Pacific should be given authority to charge its exception rates proposed in Application No. 55344 on an interim basis to compete with SPCC, pending final resolution of this problem.

Glen J. Sullivan, Pacific's revenue planning staff director, testified in opposition to Southern Pacific's proposal on the ground that private line service offered by Pacific is adequate at present and that SPCC does not actually offer new services. "The differences are semantical rather than substantive," he said.

The witness described intrastate message toll service, wide area telephone service, and private line service, explaining the appropriate uses for each. MTS is priced relative to distance, duration, time of day, and method of dialing. This service produces revenues in excess of costs and contributes to rate of return. WATS provides volume discounts to heavy users of message toll telephone service although limiting the access to the network. The cost savings resulting are the basis for the discount. WATS is even more productive than message toll in contributing to rate of return on a percentage basis.

He said that there are several types of private line service, the most common being voice grade service between two or more telephone locations. Sophisticated applications of this are possible in the form of equipment which permits the "dedicated" facilities

between two geographical points to be extended to multiple points at each location. Certain forms of data transmission can be handled over these facilities as well.

Customers having PBX equipment may subscribe to tie lines connecting PBX services at different locations. The voice grade circuits may also be used for data transmission, teleprinter services, and signaling and remote telemetering services within certain channels.

The witness emphasized that in his opinion, marketing research techniques were being employed to provide new products and that Pacific was in everyday contact with customers regarding their future needs. He stated that Pacific can design services pursuant to the aforementioned special assembly or experimental tariffs to fit the need and provide it to the customer.

The witness described, relating to Application No. 55344, the proposed offering of "point-to-point private line service" between eight metropolitan exception exchanges at a flat 70 cents per mile with appropriate channel, terminal, and local loop charges. 12/ He also described the use of foreign exchange service, which may be of value to some customers who

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12/ This proposed service will be considered in our subsequent opinion.

do not need 24-hour-a-day private line service.

During the past several years that measured time private line service was offered, the witness stated it did not offer any advantage over a 24-hour service since message toll service at certain numbers of minutes per day would be less expensive, and this is probably why the customer representatives did not attempt to sell this service.

The shared channel use available through Pacific is not directly related to a similar service offered by SPCC, he said. Shared use under Pacific's tariffs concerns either the type of service mentioned by the witness for ARINC (one organization buying all the time and billing its own members) or joint use in which there is a primary subscriber who is responsible for the bills.

The witness disagreed on the value of the voice plus data service below300 hertz because based upon Pacific's engineering evaluations, there is a loss in the quality of voice transmission using this simultaneous voice and data service. However, he stressed that a customer might provide its own multiplexing equipment - which would accomplish this. He was unsure whether such equipment was always compatible with Bell System equipment.

Telpak offerings (60 channels or more) are offered by Pacific at a lower rate than the equivalent bulk offering of SPCC, the witness stated. This is true both for the present interstate and intrastate Bell System tariffs.

Mr. Sullivan stated that, in the experience of the Bell System, as WATS and private line revenue of the Bell System increased, message toll revenue did not decrease but also continued to increase. The growth of WATS private line and MTS revenue was accompanied by an increase in the toll calls per telephone. This he said is a phenomenon of growth independent of the fact of cross-elasticity of service.

Counsel for SPCC showed the witness Exhibit 54 which indicated two periods for increases in message toll WATS and Telpac services, 1951-61, and 1961-71. The increases in message toll service revenues for those periods was well in excess of 100 percent, but of course included revenue increases as well as system growth.

The witness was challenged on his opinion regarding meeting all competition head-on and was shown an excerpt from a magazine article in the PTM Magazine (September-October 1973) in which the author, a products and service manager, states:

> "The competition we are experiencing is really symptomatic of us not providing the proper products and services to meet our customers' desires. Our competition has recognized these customer needs and can offer him a wide variety of equipment and services. Unfortunately for us, our customers are finding this equipment increasingly attractive when they make their buying decision."

The witness stated he disagreed with this opinion.

The witness explained the difference between the original high density/low density application and the latter application. He said the original application "completely tips the scale. It takes approximately 22 points in the State of California, costs out the plant at those locations, and between those locations comes up with a cost per circuit mile that is very low. The remaining points in the State where there is low density traffic and high cost plant, relatively high cost plant, remain to be served. And we have to serve them. The final competitive response that we have suggested is a compromise, if you will, between the two extremes. We retain the rate averaging of the stepped-rate schedule ordered in Decision No. 83162, with some adjustment in rate levels, and we meet competition by providing exceptions on just eight of the major points as opposed to trying to meet on all the points that we think other carriers will attempt to serve."

The witness explained that it was general company policy to price optical services at a higher level than the allowed rate of return in order to help offset those services which may be priced below the rate of return.

Pacific presented the testimony of William A. Kent, the director of Communications Technology for Quantum Science Corporation, Palo Alto. The witness presented Exhibit 60, a study made for Pacific concerning the entry into the private line service field of SPCC. The study, consisting of 91 pages, took into account both telephone and personal responses from numerous interviewed customers, as well as

economic data.

The study came to various "major conclusions" which, in a most abbreviated manner, may be stated as follows: No new service requirements were identified; the only major difference between Pacific's services and those offered by SPCC is the lower rates of SPCC; on the high density Los Angeles to San Francisco Bay Area route, 55 percent to 79 percent of the circuits would be switched to SPCC at a 30 percent rate differential; Pacific will experience a "severe loss" in private line service revenue as well as erosion of revenues from MTS and WATS if the competitive private line service rates were reduced by 30 percent or more; if all carriers offered private line service for 15 percent below current Pacific rates, between 24 and 41 percent of the customers would substitute private line service for MTS and between 6 and 29 percent of the customers would substitute private line service for WATS; if all carriers offered private line service for 30 percent below current Pacific private line service rates, between 27 and 53 percent of the private line service customers would substitute the private line service for MTS and between 6 percent and 32 percent of the customers would substitute private line service for WATS. The survey indicated that few customers would change to another carrier at equivalent rates.

The survey is of limited usefulness in disposing of this case. The questionnaires used did not inquire into the particular services offered by SPCC and were basically concerned with whether a customer would switch from one

kind of service already offered under Pacific's tariffs if certain rate differentials were introduced. While the survey clearly demonstrates and adequately supports the fact that certain shifts in customer demand would occur if certain rate changes are introduced, inspection of the questionnaires shows that no particular effort was made to determine what new or different services customers might wish. Under the circumstances it is small wonder that the first conclusion of Exhibit 60 is that no new service requirements were identified. The report does ask, "What new uses of private line service would you provide for your firm given a 40 percent (and various other percentages of) rate reduction from another carrier?" Such a question throws into the customer's lap the job of thinking up new and different services for himself.

It appears that the survey actually supports the conclusion that SPCC would have a great deal of difficulty entering the market at equal rates because of the rerouting incapability. The witness indicated that he was aware of the fact that Pacific maintains a sales force and assumes that it would try to educate the customers as to the differences in capability of rerouting in case of disaster. There is also the problem of paying installation charges if one switches to a new carrier, which would be an added problem in switching carriers if the rates were equal.

The witness's opinion was called into question by previous statements of his own regarding the need for specialized carriers

which appeared in an informational brochure entitled "Quantum Views" published in September of 1973 (Exhibit 64). The entire edition was devoted to the specialized common carriers.

The brochure points out the losses that are likely to occur to the general communications carriers with the advent of special carriers charging lower rates. Additionally, however, the text indicates a need for specialized services. On page 1 there is the statement "no one can dispute that AT&T (and the independent telephone operating companies) haven't done a good job in providing diverse services to their customers through the decades." On page 4 there is the statement:

> "The need for more diverse and cheaper transmission services has been well established by the traditional private line customer and the data communications oriented users. The demand for service by the private business community has outpaced the established telephone operating company's facilities. The high cost of adequate transmission facilities-bandwidth, switching, and distribution has thwarted such developers as data oriented network information systems, videophone, facsimile, and electronic mail."

Below this statement, the services provided by the specialized common carriers are

listed as part-time or time-of-day discounts, antenna tower and station site shelter space for customer-owned equipment, increased reliability of data transmission, channel sharing by different customers on a given bandwidth segment, lower holding time, such as less than a one minute minimum charge time, and a wider range of data transmission speeds.

On the following page the text states that in summary, the emerging competition by the special carriers has "spurred AT&T into a series of competitive reactions, such as their proposed digital data service (DDS)".

In response to a question by the examiner, the witness indicated that it was still his opinion, as expressed in Exhibit 64, that there was a need for specialized common carrier today, particularly in providing cheaper transmission services. He stated the growth of communication services in general is about 10 percent a year.

Protests of other Telephone Companies

Mr. Richard L. Ohlson, a vice president of General Telephone Company (General), testified against the application, stating that if Pacific's exception rates have to go into effect, General could need as much as $1.50 per year additional revenue from each residential customer. He explained that General shares in settlement revenues with Pacific. His testimony indicates that to the extent that MTS and WATS revenue is diverted as a result of the private line offerings, General's revenue would be adversely

affected. He stated, however, that if Pacific were to offer private line service under the exception rates, he would expect Pacific's business in this category to increase.

General apparently has made no studies of the amount of contribution to revenue requirements that would be lost upon SPCC's entry into the market. He stated, that to the extent that business over the most profitable routes are lost, contribution would also be lost. The $1.50 a year impact to the residential telephone user was a "possible impact" and apparently not a firm determination that such an impact will actually occur.

This witness pointed out that if a company such as General were to make available various short-term private line services, since there is a peak demand during the daytime and many customers do not use the private lines at night, the entire private line pricing structure would have to be rearranged in order to earn the same return.

He explained that a telephone company offering general service would not be able to economically switch channels on and off to accommodate short-term use, but admitted it would be possible to arrange the equipment so that if a customer bought something less than a 24-hour channel, a service could be offered under which a telephone company provided one rate for certain specified hours and a higher rate for use outside of those hours.

Richard D. Crowe, a vice president of Continental Telephone Company, also testified against the application. He indicated his company was opposed to the entrance of specialized carriers in the field on the ground that customers' needs were being met at present.

Revenue Effect of Exception Rates

Mr. Sullivan's testimony explained the net revenue effect of the rates proposed in Pacific's application, which, he said, would cause an annual revenue increase of $1,854,000.

The witness described in detail the studies done under his direction showing the impact competitive private line service would have in California, with and without the introduction of the exception rate plan (high/low rates). It was his belief based upon surveys that if private line service were available at rates 30 percent below Pacific's, 64 percent of the customers would switch carriers; that between 68 and 100 percent of the MTS users would replace that service with private line service, and that 49 percent of the WATS subscribers would change to private line service. At identical rates, it was his opinion that only about 7 percent of Pacific's private line customers would make the switch to a new carrier.[13]

13/ This witness's testimony on elasticity of demand will be covered in greater detail in our final opinion.

The witness stated he inspected various company records to reach his conclusion that no latent or previously unexpressed demand was being fulfilled by SPCC offerings. In response to a request from SPCC, the witness produced various company records upon which he stated he relied.

In summary, Mr. Sullivan felt that granting the application would erode the broad base necessary for rate averaging. Exception rates would have, he explained, a negative economic effect on the remaining telecommunications ratepayers in California.

Staff Recommendations

The staff presented the testimony of Paul Popenoe, Jr., assistant communications engineer. In his prepared testimony in Exhibit 69 he recommended certain "safeguards to reduce the shift of cost burden to exchange rate payers." Specifically, he proposed:

"1. That SPCC be required to operate at rates for channel mileage no lower than those of the telephone utilities for equivalent service.

"2. That terminal equipment charges be based upon the full computed costs of providing the service using the computation method developed by the Commission staff.

"3. That rates for any service which

combines channel and terminal functions be based upon the rates of the previous two recommendations.

"4. That any direct connection of private line circuits to the exchange network be strictly prohibited. This includes any connection similar to foreign exchange service.

"5. That any tie line connections to PBX switchboards be arranged in such a way as to prevent through calls to be made to or from the exchange network at either or both ends."

The witness said that based upon the staff's analysis of Pacific's fully allocated costs for 12 months ended December 31, 1973, the private line services of Pacific earned only a 2.72 percent rate of return, compared with the 8.85 found reasonable for the overall operation. He explained this was due to the fact that Pacific serves many high-cost-to-serve customers in areas out of the main business corridors. The result of eliminating statewide averaging of private line rates, he said, would be to shift the burden of costs to different customers than are now carrying it. Substitution of private line service for MTS would result in reduced toll revenues (offset to some extent by a corresponding decrease in exchange costs assigned to toll).

Another effect, according to the witness, is a decrease in exchange earnings due to the reduction of exchange costs assigned to message

toll under the separations procedures.

The third effect, he said, is a further reduction of exchange earnings which will result if the private line messages are permitted to enter the exchange network as local calls as with tie line or foreign exchange service.

Lastly, the exchange loss is increased even further due to message stimulation resulting from removal of time and distance charges on each message.

These effects result from separation procedures whereby costs are divided between message toll and exchange operations generally in proportion to the relative minutes of use of toll and exchange service. Thus, according to the witness, the real effect of diverting message toll service to private line service is to place an increased cost burden on the local exchange telephone user.

The witness believed that sufficient restrictions should be applied by the commission to prevent cutthroat competition and diversion of message toll business, in order to minimize the shift of the cost burden. The recommendations mentioned above were made in order to carry this out. He conceded that there would be rate reductions on the longer haul routes, but in his opinion the predominant number of customers would be those using the short-haul routes who would receive increases.

He stated it was his opinion that during

the interim period, if SPCC were to go into business with its rates as proposed there would be a large diversion of Pacific's business. During that period the effect on Pacific's earnings, he said, would be negligible but other issues besides the immediate effect on earnings would have to be considered. Customers might have substantial increases at the end of the interim period, and then would be in a situation where, having switched to SPCC, they would not have achieved the rate advantage upon which they relied.

Mr. Popenoe stated that in his opinion SPCC's own evidence indicates the rates proposed will not be compensatory during an initial period, and that it may be a number of years before such rates become compensatory.

Mr. Popenoe was not of the opinion that SPCC would operate at a disadvantage if its rates were the same as Pacific's, because SPCC already had interstate customers who would look to one carrier to provide the private line needs, and also, because SPCC offers a number of package arrangements attractive enough to some customers without a rate differential. He pointed out that for many years Western Union has been operating at comparable rates with Pacific and yet has managed to obtain intrastate California customers.

Regarding measured time private line service rates, he said that there is not any comparable Pacific rate and therefore such rates

would have to be "factored on some appropriate basis".

Discussion

While recognizing that the grant of a certificate and the tariff problems presented in these proceedings are interwoven, we believe that public need for the services proposed has been demonstrated, and that therefore, in this interim decision, we should grant SPCC a certificate of public convenience and necessity which will allow it to perform its proposed services within a certain specified service area, but that interim rates for SPCC should be such that Pacific's rates will not have to be adjusted during the interim period.

The innovative nature of the SPCC services was seriously questioned. All of these services are not as novel as SPCC suggests but they do not simply copy Pacific's.

Pacific is not now offering a packaged multi-point facsimile system, nor a videovoice service. Such systems could be pieced together under Pacific's special or experimental tariffs, but the evidence of the public witnesses establishes without question that these tariff provisions are not being promoted or explained by Pacific's sales force and very little use is made of them.

Voice plus data transmission is not offered by Pacific, although a customer may buy his own multiplexing equipment. There is an obvious advantage to a packaged offering in this regard.

The remainder of SPCC's proposed services involve primarily the different arrangement of lines, services, and tariffs to produce different usage results. This does not render them non-innovative. For example, different bandwidths are available on a single channel. Customers may lease from SPCC all equipment and facilities necessary to derive a variety of sub-voice grade bandwidths on a single circuit. Additionally, this may be used in conjunction with SPCC's shared channel offering, permitting two or more users at diverse locations simultaneous use of a single line for data transmission.

A closer question is presented by the offering of scheduled time service (12-hour time periods) and scheduled metered time service (2, 4, 5, or 8 hour periods). Although these proposed services represent no technological advances, we believe they are "innovative" in the sense that they meet a demand for low-cost part-time transmission. The extent of this demand is not known, but the evidence preponderates that Pacific made no particular recent effort to tap it. Formerly, a tariff of this sort was on file but was withdrawn. Pacific indicates there was no demand for it, but some of the public witnesses who were in the communications field for several years indicated they never heard of it.

Furthermore, although Pacific and other similarly situated carriers cannot set up a system where such lines are physically shut off (as is the case with SPCC), it is perfectly possible to arrange automatic equipment so that

transmissions occuring outside of the hours selected would be billed at a high rate, discouraging off-hour use. There appears to have been no investigation by Pacific or General of any demand for low-cost, off-hour use of private lines.

Twenty-four hour private line service is, of course, not innovative of itself at all, but we believe SPCC should be permitted to institute it so that customers wishing to take 24-hour advantage of the various package arrangements offered may do so.

We believe there is no serious challenge to the quality or adequacy of the proposed services. In addition, the protestants raised no issues as to technical feasibility of the proposed system, economic feasibility, technical competence, financial responsibility, or environmental impact.

We believe, however, that the exact demand for the services, in terms of quantity, is speculative. We agree with much of the criticism of SPCC's forecasts. The advertisements which solicited responses stressed lower cost. Sales summaries show only the number of interstate circuits sold. The SPCC presentation in this regard furnishes the Commission with inadequate information regarding how many potential customers want new and different services, and how many simply want lower cost

private lines. 14/

The same problem exists with the SPCC forecasts of profitability and revenue requirements. We will discuss this topic at greater length in our final decision, but we will state here that the optimistic forecast regarding 1975 intrastate profitability based upon the proposed rates is speculative. Understandably, SPCC's forecasts can rely upon little recorded information and appear to have considered the demand for SPCC's service which would be generated by using SPCC's proposed rates against Pacific's existing rates (a situation which would produce maximum diversion from Pacific).

We are mindful, above all, that if interim rates are to be allowed, they must consider the differing responsibilities of different types of carriers. While Pacific must, under its authority, offer general service over a wide area of varying density and service cost, a specialized carrier such as SPCC selects a high-density, high-profit area. In this case, it is the urban spine running from San Francisco to Los Angeles.

Because of these differing responsibilities, we must consider, both here and in our final decision, the effect of entry of specialized

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14/ We will consider Mr. Sullivan's studies and other "elasticity" evidence, including effect on exchange revenue, more fully in our final decision.

carriers upon low density and exchange customers. These customers are entitled, to reasonable and adequate, but not absolute, protection against changes in the industry. In other words, we believe that excessive diversion of revenues from MTS, WATS, and private line revenues must be controlled through proper rate and tariff regulation, rather than forbidding the entry of specialized private line carriers. Also, we agree with the staff witness that low rates which might later be the subject of a substantial increase are undesirable.

For the above reasons interim rates should be set which will minimize rate differentials and encourage SPCC to concentrate upon expanding its business by offering new approaches to its potential customers, rather than by stressing large differences in rates.

III. INTERIM RATES

Since we believe SPCC has proved a public demand for its services, and since a major investment is involved, we believe the setting of interim rates is appropriate.

Two options are open to us: (1) allow SPCC to file its proposed rates and then permit Pacific to place its exception rate plan into effect, or (2) keep Pacific's rates as they presently stand and allow SPCC interim rates which are the same or similar to Pacific's.

We choose the second alternative. An exception rate plan is a drastic change and

results in rate increases for so many customers outside the exception rate areas that no such plan should be adopted on an interim basis. Pacific's previously filed private rates carry a presumption of reasonableness. A major change in the structure of such rates should await our final determination after the issue is fully briefed.

During the interim period, we believe, as we have stated, that it is reasonable for SPCC to rely primarily upon the innovative nature of its services rather than upon a large price differential to expand its business. We will therefore authorize interim rates for SPCC which will set the 24-hour rates at the same level as Pacific's for equal mileage blocks. SPCC's authorized rates for shorter time periods will be in the same proportion to the authorized 24-hour rates as the proposed short-hour rates were to the proposed 24-hour rates. SPCC will thus still retain some competitive advantage in pricing since Pacific is not now offering less-than-24-hour private line service. This is reasonable for the interim period because the evidence shows that SPCC will function under certain competitive disadvantages:

1. There is no rerouting capability in case of catastrophic loss to the system;

2. Certain resistance to SPCC's service will be caused by the fact that a customer, to meet all its communication needs, will have to deal with two carriers; and

3. SPCC is smaller and less well known, at least at present, as a carrier than Pacific.

SPCC has at present applied for less-than-24-hour rates between San Francisco and Los Angeles only. At least until our final decision, we will prohibit any filing of tariffs for such rates to the other points authorized to be served without first filing an application for authority to do so.

During this interim period we will order certain reports to be filed, as indicated in the order, designed to give the Commission more information on the demand for the different services. As mentioned, we will also order SPCC's tariffs augmented to describe the various services offered and to include any incidental or miscellaneous charges connected therewith.

The remainder of the staff witness's recommendations regarding rates and connections (listed as Nos. 2, 3, 4 and 5 on page 40, above) are sound policy and should be adopted. We reserve judgment on their final adoption until our final decision

Findings

1. SPCC, a subsidiary of Southern Pacific Company, has constructed a point-to-point microwave telephone system from San Francisco to Los Angeles and to points out of State, currently operating an an interstate basis pursuant to FCC authority.

2. The system is designed to operate on both an interstate and an intrastate basis, and was originally designed and built with the total California demand for private line service in mind.

3. SPCC holds no authority from this Commission to operate as a telephone corporation.

4. SPCC will offer only private line service and no standard telephone service between San Francisco and Los Angeles.

5. While present private line services and tariffs of Pacific are adequate from a standpoint of reliability and for the purposes for which they are intended, there is a public need for the new services and tariffs proposed by SPCC.

6. Some of the demand for SPCC's service is due to the novelty of its services; some of it is due to proposed lower rates. While a preponderance of the evidence shows a public demand for the new services, it is not possible at this time to determine what percentage of it is attributable to the need for the new services as against the percentage caused by the proposed offering of lower rates.

7. Forecasts of profitability for 1975 California intrastate service are speculative and are based upon SPCC's proposed rates against Pacific's present rates; therefore, we should order the filing of certain financial data as specified in the order.

8. Interim rates for SPCC should be set to achieve competitive parity between SPCC and Pacific, insofar as possible. The issue of "exception rates" should be deferred until the final decision in these proceedings. SPCC's proposed tariffs previously filed under its Advice Letter No. 1 should be rejected.

9. SPCC has the technical competence and financial responsibility to perform the proposed services.

10. Undue diversion of revenues from MTS, WATS, and private line revenues of Pacific and similarly situated companies should be controlled through proper rate and tariff regulation. The need for the new services outweighs the advantage of offering existing carriers absolute protection against loss of revenues by way of denying entry into the specialized private line market by SPCC.

11. SPCC should be ordered to augment its tariffs by filing tariff descriptions of all services presented to us in the testimony and evidence herein.

12. We find with reasonable certainty that the project involved in this proceeding will not have a significant effect on the environment.

13. Public convenience and necessity require the services set forth in the following order.

Conclusions

1. SPCC holds no authority from the FCC which would allow it to operate its proposed services intrastate in California.

2. SPCC requires a certificate of public convenience and necessity from this Commission to commence its proposed California intrastate service.

3. SPCC's system includes "lines" as that term is used in Public Utilities Code, Section 1001.

4. This Commission should not adopt a policy of categorically excluding specialized communications carriers from the California intrastate market.

5. SPCC should be granted a certificate of public convenience and necessity to perform the services it proposes, subject to the conditions in the order and under the interim rates specified.

INTERIM ORDER

IT IS ORDERED that:

1. Southern Pacific Communications Company is granted a certificate of public convenience and necessity authorizing it, as a public utility, to establish intercity private line communication service for voice and data transmission, between the cities of Bakersfield,

Fresno, Los Angeles, Merced, San Francisco, and Stockton, including but limited to the Exchange Areas contained in the Description of Local Distribution Areas as identified on Sheet No. 8-T of its Advice Letter No. 1 dated April 15, 1974.

2. Southern Pacific Communications Company is authorized to file, on or after the effective date of this order, and in conformity with General Order 96-A, tariff schedules based upon interim rates specified in Appendix A hereto, together with interim tariff provisions and rules conforming to those included in Exhibit 6. Such rates and tariff schedules shall be made effective on not less than five days' notice to the public.

3. The proposed rates, rules, and tariff schedules of Southern Pacific Communications Company filed under its Advice Letter No. 1 dated April 15, 1974 are rejected.

4. For purposes of allowing the Commission to augment SPCC's tariff filings by further order, Southern Pacific Communications Company shall submit, within 45 days after the effective date of this order, a report on the services described in Exhibits 13, 14, and 15. This report shall contain a complete description of each of the services, the proposed rates, charges, and tariffs therefor, and the cost support for each rate or charge. In addition, the probable market for each service for each of the first five years of service offering shall be stated, together with the estimated total

revenue to be derived therefrom in intrastate service.

5. Future filings for terminal equipment charges shall be based upon the full computed costs of providing the service using the computation method developed by the Commission staff.

6. Rates for any service which combines channel and terminal functions shall be based upon the rates authorized herein and subject to the provisions of Ordering Paragraph 4.

7. Any direct connection of private line circuits to the exchange network is prohibited. This includes any connection similar to foreign exchange service.

8. Any tie line connections to PBX switchboards shall be arranged to prevent through calls from being made to or from the exchange network at either or both ends.

9. Southern Pacific Communications Company shall file with this Commission copies of all its annual reports made to the Federal Communications Commission.

10. Pending our final decision, Southern Pacific Communications Company shall not file any tariffs for less-than-24-hour service other than those authorized herein, for any points authorized to be served, without first applying for authority to do so.

11. Southern Pacific Communications Company shall maintain its accounting records in conformance with the Uniform System of Accounts for Class A and Class B Telephone Companies prescribed by the Federal Communications Commission as set forth in Part 31, Volume VIII, Rules and Regulations, and subsequently adopted with certain modifications by this Commission, and shall file with this Commission, on or before March 31 of each year, an annual report of its operations in such form, content and number of copies as the Commission, from time to time, shall prescribe.

12. Southern Pacific Communications Company shall determine accruals for depreciation by dividing the original cost of the depreciable utility plant, less estimated future net salvage and less depreciation reserve, by the estimated remaining life of the depreciable plant. The utility shall review the accruals as of January 1 following the date service is first furnished to the public as authorized herein and thereafter when major changes in depreciable utility plant composition occur, and at intervals of not more than three years. Results of these reviews shall be submitted to this Commission.

13. Within 30 days after the end of each month, subsequent to the date service is first rendered to the public as authorized herein, applicant shall file a written report of the earnings results of its intrastate operations separated from its total business. The report shall include revenues by types of service, expenses by each major class of operating expense, operating taxes, depreciation, the amount of depreciation

reserve, and the plant and other assets devoted to public service. The separation of accounts between total operations and intrastate operations shall be made in accord with the NARUC separations manual, Part 67 of the FCC rules. The monthly report shall also include the number of end-of-period customers and the miles of equivalent private line voice circuits in operation segregated by revenue producing and non-revenue producing circuits. The form of monthly statement to be filed is attached hereto as Appendix B.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 4th day of March, 1975.

VERNON L. STURGEON
President
WILLIAM SYMONS, JR.

D. W. HOLMES

Commissioners

I will file a written concurrence.
/s/ Leonard Ross, Commissioner

CERTIFIED AS A TRUE COPY.

/s/ William R. Johnson
Secretary
Public Utilities Commission
State of California

APPENDIX A

Southern Pacific Communications Company
Authorized Interim Rates

Schedule G-1, Intercity Channels for Data Transmission

RATES

Data Transmission Speed - Baud	Rate per Mile Per Month
Low Speed	
Up to 75	$0.20
Up to 110	.25
Up to 150	.31
Up to 200	.37
Up to 300	.61
Medium Speed	
0-9600 (Each channel equal to one voice grade channel or 4,000 Hz)	Same Rates as in Schedule G-2, Intercity Channels for Analog Transmission

Schedule G-2, Intercity for Analog Transmission

RATE

			Rate per Mile per Month
Each Voice Grade Channel Equivalent	First	15 Miles	$4.00
	Next	10 Miles	3.75
	Next	25 Miles	3.25
	Next	50 Miles	2.75
	Next	50 Miles	2.25
	Next	150 Miles	2.00
	Next	300 Miles	1.25

Schedule No. G-3, Network Terminals

The rates and charges set forth in Schedule No. G-3 of Exhibit 6 are authorized.

Schedule No. G-4, Local Distribution Facilities

The rates and charges set forth in Schedule No. G-4 of Exhibit 6 are authorized.

Schedule No. G-5, Scheduled Time Use

The discounts provided for in Schedule No. G-5 of Exhibit 6 are authorized.

Schedule No. G-6, Shared Channel Use

The rates and charges set forth in Schedule No. G-6 of Exhibit 6 are authorized.

Schedule No. G-7, Miscellaneous Equipment and Services

The rates and charges set forth in Schedule No. G-7 of Exhibit 6 are authorized.

Schedule No. G-8, Intercity Channels for Schedule Metered Time Service

The following rates and charges are authorized for service between San Francisco and Los Angeles:

Scheduled Consecutive Hours	Voice Channel Minimum Bill/Month	Voice Channel Rate Per Hour	Conditioned Channel Minimum Bill/Month	Conditioned Channel Rate Per Hour
Daytime (8 am - 6 pm)				
2 hrs/day	$170	$19.60	$210	$22.10
4 hrs/day	240	14.45	280	16.45
6 hrs/day	305	9.35	345	11.35
8 hrs/day	425	7.20	465	9.20
Nighttime (6 p.m. - 8 a.m.)				
4 hrs/day	$170	$ 6.80	$210	$ 6.80
6 hrs/day	255	6.80	295	6.80
8 hrs/day	340	6.80	380	6.80

Other Tariff Provisions

Rules, conditions and other tariff provisions set forth in Exhibit 6 are authorized.

APPENDIX B

Southern Pacific Communications Company Monthly Earnings Statement to be Filed With The California Public Utilities Commission

Item	Month of: Total Oper.	Month of: California Intrastate	12 Mos. Ended: Total Total	12 Mos. Ended: California Intrastate
Revenues				
Private Line Revenues				
Miscellaneous Revenues				
Uncollectible Revenues				
Total Revenues				
Expenses & Taxes				
Maintenance				
Traffic				
Commercial				
General & Other				
Depreciation Expense				
Taxes Other than Income				
State Income Tax				
Federal Income Tax				
Total Oper. Exp. & Taxes				
Net Revenue				
Average Net Plant & Working Capital				
Plant in Service				
Property Held for Future Use				
Working Cash				
Materials & Supplies				
Total Plant & W.C.				

Depreciation Reserve
Other Reserves
Net Plant & W.C.

Percent Return (Annual basis)

End of Month Statistics
Number of Customers

Decision No. 84167

BEFORE THE PUBLIC UTILITIES
COMMISSION OF THE
STATE OF CALIFORNIA

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Complainant, vs. SOUTHERN PACIFIC COMMUNICATIONS COMPANY, Defendant.	Case No. 9728 (filed May 1, 1974)
In the Matter of the Suspension and Investigation on the Commission's Own Motion of Tariffs filed under Advice Letter No. 1 by Southern Pacific Communications Company.	Case No. 9731 (filed May 17, 1974)
Application of SOUTHERN PACIFIC COMMUNICATIONS COMPANY for a certificate of public convenience and necessity to operate a telephone line between San Francisco and Los Angeles.	Application No. 55284 (filed October 31, 1974)

Application of the Pacific Telephone and Telegraph Company, a corporation, for authority to revise rates, charges and rate structures for intrastate voice grade private line service in order to establish a modified High Density - Low Density Service, Referred to as an Exception Rate Service, and to withdraw the High Density - Low Density Service proposal which was the subject of Application No. 54839.	Application No. 55344 (filed November 26, 1974)

CONCURRING OPINION OF
COMMISSIONER ROSS

I concur with the decision of the Commission, but would prefer a more explicit and permissive policy toward the applicant's rate filings. Southern Pacific Communications Company - or any applicant for service competing with a monopoly telephone company - should be allowed to charge rates as low as it wants if it will promise to keep those rates in effect for a reasonable time. (Or, alternatively, the applicant in some cases might be allowed to stipulate a maximum range of price increase over a given period). The telephone company should, in turn, be permitted to reduce its rates to or below the level established by the new competitor, provided that the company can

demonstrate that such rates do not fall short of the long-run incremental costs of providing such service.

This policy would maximize the opportunity for competition in telephone communications. It would, to be sure, require deviations from a rate structure based on average or fully allocated costs of service. But such a structure has little economic rationale; if it is appropriate at all (and in many cases it may be), its primary justifications are administrative convenience and long-run stability. These considerations are, in my opinion, outweighed by the paramount importance of introducing competition wherever feasible into regulated monopoly industries. In some cases competition may amount simply to "cream-skimming" -- but I doubt whether such cases can be identified by regulatory agencies except at the cost of a process so cumbersome as to discourage all potential competition.

Price reductions are rare enough these days. The Public Utilities Commission should not put unnecessary obstacles in the way of any company that offers lower prices.

/s/ LEONARD ROSS
Commissioner

San Francisco, California
March 11, 1975

SUBCHAPTER I. GENERAL PROVISIONS

§152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all ratio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indrectly controlling or controlled by, or under direct or indrect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoint the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under

direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection. June 19, 1934, c. 652, Title I, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63.

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires —

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense. June 19, 1934, c. 652, Title II, § 205, 48 Stat. 1072.

§ 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: Provided, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: Provided further, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section

the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: Provided, however, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right of those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the

issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues. June 19, 1934, c. 652, Title II, § 214, 48 Stat. 1075; Mar. 6, 1943, c. 10, §§ 2-5, 57 Stat. 11.

§221

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

§ 410

Federal-State Joint Board; reference of proceedings regarding jurisdictional separation of common carriér property and expenses between interstate and intrastate operations and other matters relating to common carrier communications of joint concern; jurisdiction, powers, duties, and obligations; recommendation of decisions; State members: presence at oral arguments and nonvoting participation in deliberations; composition; Chairman

(c) The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties,

and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions, as referred to in sections 302(b) and 305(f) of Title 49, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

As amended Sept. 30, 1971, Pub. L. 92-131, § 2, 85 Stat. 363.

§ 554

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

CALIFORNIA RAILROAD COMMISSION DECISIONS.

DECISION No. 14420.

IN THE MATTER OF THE APPLICATION OF SOUTHERN CALIFORNIA TELEPHONE COMPANY FOR AN ORDER AUTHORIZING EXCHANGE AREAS IN THE TERRITORY SERVED; AUTHORIZING THE INTRODUCTION OF MEASURED SERVICE, AND AUTHORIZING JUST AND REASONABLE RATES, TOGETHER WITH RULES AND REGULATIONS APPERTAINING THERETO FOR THE TERRITORY SERVED.

Application No. 9648.

SIMONS BRICK COMPANY, A CORPORATION,
vs.
SOUTHERN CALIFORNIA TELEPHONE COMPANY, A CORPORATION.

Case No. 2026.
Decided December 31, 1924.

RATES — TELEPHONE UTILITY — RATE OF RETURN. — The utility is found under present operation and under existing rates, to be receiving a return of but $1\frac{1}{2}$ per cent upon the reasonable cost of the operative property, and is entitled to a return, based on 1924 conditions, of $6\frac{1}{2}$ per cent.

REASONABLE RATE BASE.— Reducing the utility's claim of its property value by approximately $8,000,000, the Commission finds $58,681,000

to be a reasonable rate base for the year 1924.

OPERATING EXPENSES.— Allowance for operating expenses is reduced $2,600,000 below the amount claimed by the utility.

COMPANY'S STATUS.— It is found that Southern California Telephone Company is to all intents and purposes, a division, or district, of The Pacific Telephone and Telegraph Company, which in turn acts as a division or district of American Telephone and Telegraph Company.

PARENT UTILITY. — American Telephone and Telegraph Company, relative to service to associated companies, should be subject to investigation by state commissions in the same manner and to the same extent as other utilities, and this company should be prepared to furnish such evidence as to cost of operation as the state commission may deem fit to require.

QUALITY OF SERVICE. — Although service has been unsatisfactory in the past, it is now satisfactory, and justifies a fair return upon the property used and useful in the public service.

FAIR RATE OF RETURN. — While a return of $6\frac{1}{2}$ per cent on the rate base is allowed on the 1924 basis, it is found that with increased efficiency and coordination of its system the utility should earn a greater return.

READJUSTMENT OF RATE PLAN. — It is pointed out that Los Angeles is developing into a metropolitan district of such extent that the present rate plan will soon become obsolete, and steps must be taken to readjust the rate plan to fit the new conditions.

FOREIGN EXCHANGE SERVICE.— Foreign exchange service is established to care for industries located in outlying, and other exchanges, requiring Los Angeles exchange service. Rates are fixed for this class of service to subscribers in the Culver City and Montebello exchange areas.

LOCAL EXCHANGES ESTABLISHED.— Montebello exchange is continued; Culver City established as a separate exchange; Beverly Hills retained as a part of Los Angeles exchange.

FOREIGN EXCHANGE SERVICE.

One of the requests of applicant in this proceeding was for authority to establish a foreign exchange service which will allow a subscriber in any area to obtain a direct or local service from any other exchange, provided, certain conditions are complied with. As an illustration of the application of this type of service, a subscriber in Montebello would be able to obtain direct service from the Los Angeles exchange by the payment of a foreign exchange rate and by fulfilling the special conditions connected with this rate. The establishment of this service will meet the demand of certain parties appearing in this proceeding in that it provides a means for obtaining Los Angeles service outside the Los Angeles area.

Simons Brick Company filed a formal complaint, Case No. 2026, with this Commission on July 25, 1924, requesting this Commission to require Southern California Telephone Company to render to it a private line service between its plant at Simons, located within the Montebello exchange area, and its Los Angeles office, located

in Los Angeles exchange area. At the time this complaint was made there had been no discussion or mention of the foreign exchange service, and the Commission felt that until all its investigations, which it was making in connection with this proceeding, were completed there was no reason why the Simons Brick Company's request should not be granted pending the final decision in this proceeding. This matter was so decided.

This request of the Simons Brick Company illustrates the conditions which the foreign exchange service is contemplated to meet, and for such conditions it appears that a foreign exchange rate will give the subscriber the service which is desired. Although the establishment of a foreign exchange service represents a departure from previous procedures, there is no question but that this service will adequately and very satisfactorily meet the demands of certain subscribers. Its success will depend largely upon the extent to which this service is used. This service is stricly a substitute for toll service and, if it becomes too extensive, will be seriously detrimental to the general service and may result in extra burdens on the service as a whole. The rendering of this service will, in general, violate economical construction principles and will also require the use of lines equivalent to those of a toll lead with possible uneconomical use. Foreign exchange service will be a success only as long as the number of such services is relatively few. This service should only apply to the exceptional case, and the conditions of the rate must be such that there will not be a general demand by any group of subscribers for the service.

The company, in requesting the establishment of this service, has included certain qualifying conditions, which provide that the service will be rendered only when circumstances warrant and when it does not impair the service furnished to the general public, or where facilities are not available, and further, shall be rendered only by such means as may be best suited to meet plant and operating requirements and that additional charges may be made when special operations are required. These conditions further provide that joint user service be not permitted, and also, that the subscriber must subscribe for local service from the exchange within which he is located. We are at a loss to know the exact purport of some of these qualifying clauses. If applicant be allowed to furnish foreign exchange service, it must render it and be in a position to furnish the same upon demand, in the same manner as any other regular service is furnished. No provision limiting the use to those instances which, in the opinion of the company, warrants the establishment of the service where facilities and equipment is necessary, will be allowed by this Commission. This service, if it is to be furnished, should be quoted as a regular service for a definite charge and available upon demand of a subscriber. Under no other conditions will we authorize this rate to be established. The requirements placed upon this service by the company, providing that the foreign exchange subscriber be required to subscribe for the local service from the exchange within which he is located, can not work any unreasonable hardship on him, and it is fair and just to the local subscribers in that exchange that telephone conditions be available without toll.

We believe that there is a real demand for foreign exchange service, and that its establishment will satisfy certain needs heretofore not taken care of. Applicant at the time it made its request for foreign exchange service stated that it was willing to render Los Angeles service in any other exchange located anywhere throughout the country. The establishment of foreign exchange service beyond the boundaries of the territory now served by Southern California Telephone Company can only be done after further proceeding before this Commission, which will involve not only applicant, but the other operating telephone utilities serving those areas. The establishment of foreign exchange service in this proceeding must be limited to the present exchange areas of the Southern California Telphone Company.

The complaint of those few subscribers in the Glendale area having an exceptional demand for Los Angeles service would, however, be satisfied, provided foreign exchange service could be rendered herein. The Pacific Telephone and Telegraph Company furnishes telephone service within the Glendale area. In order that subscribers located in Glendale may have Los Angeles service, we suggest, therefore, that applicant arrange with the Pacific Company for the rendering of foreign exchange service throughout the exchanges served by the Pacific Company, adjacent to applicant's territory.

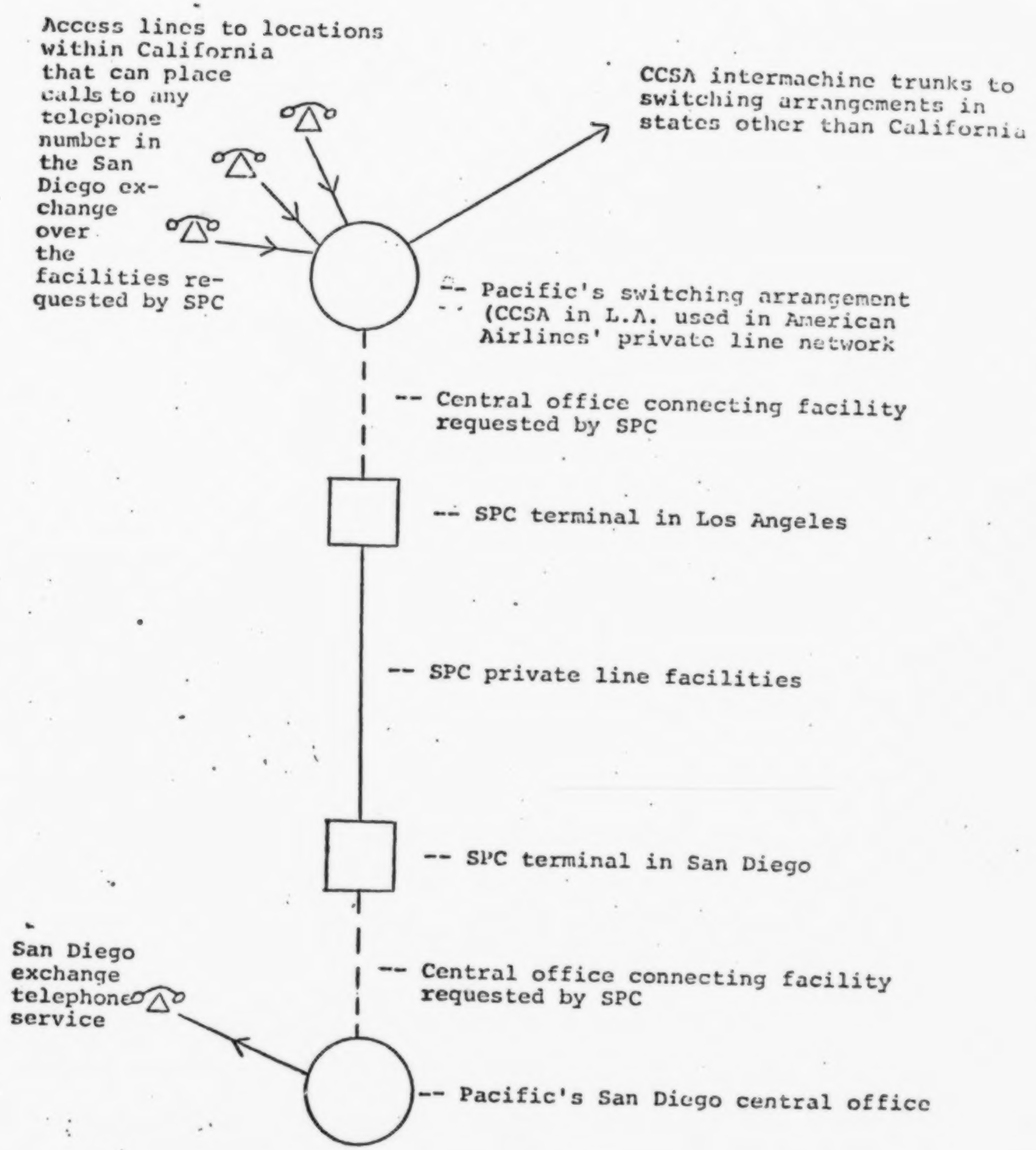
The rates for this service, applying in contiguous areas, as proposed by the company, are computed on the basis of the local rate from which the foreign exchange service is rendered, plus a mileage charge based upon the distance from the boundary of that primary rate area to

to the exchange area boundary, plus another mileage charge based upon the d istance from the exchange boundary to the subscriber's premises.

A foreign exchange service is, in reality, a service competing with toll service, and the rate for this service should take the paralleling toll rates into consideration. An equitable basis for this rate is a charge dependent upon the toll distance between exchanges. However, for adjacent exchange areas, this would result in an abrupt increase in charges for those subscribers just over the border line. In order that this sudden increase might not take place, and inasmuch as the foreign exchange rates in this proceeding are only to be fixed for Los Angeles service furnished in the Montebello and Culver City exchange areas, and Montebello and Culver City service in the Los Angeles exchange area, it appears reasonable to fix these rates by adding to the local rate and local mileage of the foreign exchange a mileage charge based upon the distance between the subscriber's premises and the foreign exchange boundary.

* * * * *

SCHEMATIC OF CONNECTIONS REQUESTED BY SPC



This arrangement provides San Diego dial tone on the CCSA in Los Angeles, thus providing San Diego local calling and toll calling from San Diego to any party with access to the CCSA network.

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77-406

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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The Pacific Telephone and Telegraph Company, a party in the proceedings below, pursuant to Supreme Court R. 21(4), submits this brief as Respondent in support of Petitioners' request that a writ of certiorari issue in this proceeding.

QUESTIONS PRESENTED

The case at bar results from a declaratory ruling by the FCC, which, contrary to an order of the California Public Utilities Commission, authorizes Southern Pacific Communications Company (SPCC), to provide foreign exchange service between two points in California based on the fact the same facilities are also used for interstate calls (App. B).[1] The questions presented are:

1. Does the FCC's preemptive assertion of jurisdiction over intrastate foreign exchange service violate the explicit mandate of Section 2(b) of the Communications Act that "nothing in this Act" shall "apply to or give the Commission jurisdiction with respect to charges (or) facilities . . . for or in connection with intrastate communication service by wire or radio of any carrier." (47 U.S.C. §152(b), (App. D).

2. Assuming the first question is answered in the negative, then does the record demonstrate the unavoidable necessity for the exercise of that power in this case?

STATEMENT OF THE CASE

From almost the beginning of telephony the individual states have pervasively regulated the provision of public telephone service in this country. However, prior to the passage of the Communications Act in 1934, interstate rates for long distance service were not extensively regulated. Through the vehicle of the Communications Act, Congress sought to fill this void by provision of adequate federal regulation over interstate service but, at the same time, to preserve existing state regu-

[1]The appendices (App.) are separately bound and are being jointly submitted by The People of the State of California, The Public Utilities Commission of the State of California (CPUC) and the National Association of Regulatory Utility Commissioners (NARUC).

lation over intrastate services and protect it against federal invasion.

Since enactment of the Communications Act, state and federal regulatory spheres, with respect to the regulation of intrastate and interstate telephone service, have been traditionally determined by the beginning and ending points of the telephone call. Normally, the FCC has regulated communications crossing state lines and the states have regulated all communications taking place within a single state, even though the same equipment and facilities may be used for both.[2] This division of jurisdiction conforms to the legislative mandate. Sections 2(b) and 221(b) of the Act evidence a deliberate Congressional intent to preserve existing state regulation. By enactment of these sections Congress reserved to the States "exclusive" jurisdiction over intrastate service (S. Rep. No. 781, 73d Cong. 2d Sess. 3 (1934)) to assure that the legislation would not affect the 97 or 98 percent of telephone communications that were and are intrastate. 78 Cong. Rec. 10316 (1934).[3] As the Senate Manager explained during Congressional hearings on the Act:

> "[A]t the request of the State Commission representatives, we wrote in certain provisions that are not in the Interstate Commerce Act, to protect the State commissions against being overridden by this Commission [the FCC],

[2]A telephone message originating within a state and terminating within that same state is considered an intrastate transmission, even if it transverses another state in the process. The Communications Act provides that "'Interstate communication' . . . shall not . . . include wire or radio communication between points in the same State, Territory or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. §153(e); see also 47 U.S.C. §221(b).

[3]Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong. 2d Sess. 179 (1934) (Senator Dill).

as the Interstate Commerce Commission has overridden some of the State railroad Commissions." [Hearings, H.R. 8301 at 136].

In establishing federal regulation, Congress not only restricted the FCC's jurisdiction to prevent federal interference with state regulation, but also enacted public interest standards to be applied by the FCC within its area of competence. Under the Congressional plan the FCC in regulating interstate carriers may not "[m]erely . . . assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one . . ."[4] This case involves only the scope of the FCC's jurisdiction—not the validity of the policies it seeks to implement. The present controversy, nevertheless, stems from new FCC regulatory policies promulgated in the past decade. It first permitted certain businesses to construct their own interstate "private line" telephone facilities and later authorized the entry of numerous new common carriers (called specialized carriers) to provide interstate "private line" service in competition with the telephone companies.[5] SPCC is such a carrier.

In a radical departure from the regulatory pattern which has existed for over 50 years, the FCC, in the case at bar, has overriden a state commission's contrary order and has asserted plenary regulatory authority over the terms and conditions of

[4] *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94-97 (1953). *Accord, Hawaiian Telephone Co.* v. *FCC.* 498 F. 2d 771, 776 (D.C. Cir. 1974).

[5] *Specialized Common Carrier Inquiry,* Docket No. 18920. *Notice of Inquiry,* 24 FCC 2d 318 (1970); *First Report and Order,* 29 FCC 2d 870 (1971); reconsideration denied, 31 FCC 2d 1106 (1971); affirmed, *Washington Utilities and Transportation Commission* v. *FCC,* 513 F. 2d 1142 (9th Cir. 1975); cert. denied, 423 U.S. 836.

intrastate foreign exchange service.[6] To accomplish this objective it has jettisoned the regulatory road map laid out in the Communications Act and has ridden rough-shod over conflicting regulatory views held by state commissions. In short, it has determined that it and it alone can adjudicate what is in the best interest of the general body of telephone users in the United States.

The history of this case begins in 1973, when SPCC, a specialized communications carrier, obtained approval from the FCC to operate an interstate microwave private line network between San Francisco, Los Angeles, Phoenix and Tucson. Following installation of its interstate network, SPCC filed an application with the California Public Utilities Commission (CPUC) to provide intrastate private line services. After hearings, the California Commission on March 4, 1975, issued an interim order granting SPCC authority to provide private line service between six California cities. This did not include San Diego. (Decision No. 84167, which appears at Appendix C). The CPUC also ordered rates for the service be set at a point that would minimize rate differentials between SPCC's service and the duplicate services of the telephone companies. It did this to protect the general body of telephone customers

[6] Foreign exchange (FX) service is a distinct class of service that is separate and apart from other types of telephone service. It is a service whereby a telephone subscriber located in one exchange area may obtain exchange telephone service in another area as if his telephone were actually located in that other exchange. Thus, for example, a subscriber in the Los Angeles exchange may utilize FX service to reach telephone subscribers located in the San Diego exchange. This capability is afforded through provision of a local loop in Los Angeles (referred to as the "closed-end" of the FX), a Los Angeles-San Diego interexchange private line (dedicated to the customer's exclusive use), and business exchange service (one or more business lines) in the San Diego exchange area. The enterprise that engages in bringing access to the San Diego exchange from Los Angeles provides an intrastate service, even though interstate calls may also be switched through the same for completion.

from the economic burden of making up the revenues which the telephone companies would lose if wide rate disparities were permitted. For the same reason the CPUC prohibited SPCC from providing:

> "7. Any direct connection of private line circuits to the exchange network is prohibited. *This includes any connection similar to foreign exchange service.*" (Emphasis added) (App. C p. 114).

Several weeks after the CPUC's order was issued, SPCC made a service request of Pacific to provide the facilities and connections needed by it to provide intrastate FX service to San Diego. Specifically, Pacific was asked to connect a SPCC San Diego-Los Angeles line (1) at the southern end to Pacific's San Diego exchange, and (2) at the Los Angeles end to Pacific's Common Control Switching Arrangement (CCSA)[7] to permit interconnection to American Airlines' nation-wide private line system. By this arrangement SPCC would be able to furnish American Airlines San Diego FX exchange service, which could be accessed from any telephone on that company's network, including Los Angeles and other cities in California.[8]

Pacific furnished SPCC the facilities and connections requested. However, recognizing that these arrangements conflicted with the recent CPUC Order prohibiting the offering of intrastate FX service by SPCC, it initiated proceedings before the California Commission for instructional advice.

In response, SPCC, on June 15, 1975, petitioned the FCC for a declaratory ruling to the effect that Bell System companies

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[7]CCSAs are large switching machines, located in telephone company central offices, which are used to switch private line network traffic.

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[8]SPCC, in its pleadings, estimated approximately 18% of the traffic over the San Diego-Los Angeles line originates in California (Ct. of App., Jt. App. p. 334).

must provide FX interconnections to SPCC's private lines whenever such lines are connected by a switch to interstate facilities. Pacific, CPUC and others filed comments and statements with the FCC opposing SPCC's petition. Based solely on these pleadings, the FCC, on October 9, 1975, issued a Memorandum Opinion and Order, granting, in effect, the relief sought by SPCC (App. B).

In its opinion the FCC recognized that the facilities involved were located wholly within California and would be used to provide foreign exchange service in San Diego from points both in and out of the State of California. However, in analyzing its jurisdictional authority, the Commission concluded that the physical location of the facilities was not jurisdictionally determinative. Rather, the Commission reasoned, the nature of the communications passing through the facilities should control federal-state regulatory jurisdiction. Applying this test, the Commission determined it was entitled to assert preemptive jurisdiction because the facilities constituted an integral part of a dedicated interstate communications network carrying interstate communications (App. B).

Although it had no evidentiary record before it, the Commission further concluded it would be contrary to the public interest to limit SPCC's San Diego-Los Angeles private line to interstate calls. Accordingly, the FCC exercised preemptive jurisdiction and ordered the Bell System (Pacific) to continue to provide the facilities in question to SPCC.

The Court of Appeals for the District of Columbia Circuit affirmed the FCC's Order by a two-to-one vote (App. A). The majority's opinion accepted the FCC's conclusions that it would be impractical to segregate interstate from intrastate FX service, and, consequently, because the "facilities are part of a dedicated interstate communications network" Commission jurisdiction was present. The majority further adopted without

discussion the Fourth Circuit's interpretation of Section 2(b) of the Communications Act to the effect that such section does not encroach substantially upon the FCC's broad powers under Title II. *North Carolina Util. Com'n* v. *FCC*, 537 F. 2d 787, 793, affirming *Telerent Leasing Corp.*, 45 F.C.C. 2d 204, cert. denied U.S. , 59 L. Ed. 2d 63 (1976). Judge Robinson, in a well reasoned dissent, agreed that the FCC is empowered to regulate intrastate communications, but only when an unavoidable federal and state regulatory conflict occurs. However, based on careful analysis of the record, Judge Robinson concluded that the evidence before the Commission did not substantiate a clearly imperative need for the Commission to assert federal preemption.

REASONS FOR GRANTING THE WRIT

The jurisdictional issue posed—whether the FCC's assertion of preemptive jurisdiction is prohibited by the Communications Act—is extremely important and merits plenary consideration on certiorari. This issue in the case at bar is broader than the conventional preemptive issue—whether a particular federal statute conflicts with and preempts a particular state statute.

The case *sub judice* arguably holds that the FCC can broadly regulate intrastate telephone services, except possibly local exchange rates, whenever federal and state jurisdictions overlap to any degree. The decision, unless reversed by this Court, could alter drastically a great number of the regulatory laws of every state, not merely one particular statute in one state.

The FCC's assertion of jurisdiction in this case and, potentially, in many others, will impact telephone company intrastate revenue to such an extent that local exchange rates, clearly within the jurisdiction of the state commissions, will be substantially affected. This Court has not yet quantified the

regulatory balance of the federal-state Title II authority established by the Communications Act of 1934. Consequently, the case presents an "important question of federal law which has not been, but which should be settled by this Court" [S.Ct. R. 19(1)(b)].[9]

Moreover, even if it is assumed that the Communications Act does vest preemptive jurisdictional authority in the FCC when an irreconcilable conflict occurs between federal and state regulation, the record in this case does not support the Commission's exercise of such drastic authority. The FCC's conclusion that it was obligated to assert preemptive jurisdiction rests on a factual assumption unsupported by the evidence. The FCC, although requested, did not see fit to hold hearings and, consequently, no opportunity was afforded the parties to develop and present the evidentiary issues. Instead, as Judge Robinson pointed out in his dissent in the Court of Appeals, "The Commission proffered only an ambiguous finding unaccompanied by any evidentiary data whatsoever" (App. A, p. 15). The FCC's choice of procedure in this case has patently deprived the parties of their due process rights and represents such a departure from "the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." [S.Ct. R. 19(1)(b)].

[9]This Court has repeatedly recognized its responsibility to delineate the jurisdictional boundaries fixed by federal regulatory statutes (Communications Act) *United States* v. *Southwestern Cable Co.*, 302 U. S. 157 (1968); *Regents of Georgia* v. *Carroll*, 338 U. S. 586 (1950); (Federal Power Act) *FPC* v. *Conway Corp.*, 426 U. S. 271 (1976); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395 (1975); (Natural Gas Act) *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954); *FPC* v. *Transcontinental Pipe Line Corp.*, 365 U. S. 1 (1961); *California* v. *FPC*, 369 U. S. 482 (1962); (Interstate Commerce Act) *North Carolina* v. *United States*, 325 U. S. 507 (1945); *Florida* v. *United States*, 282 U. S. 194 (1931).

The FCC's cavalier treatment of the preemption issue conflicts with decisions of this Court, as stated in *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132, 142 (1963):

> ". . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons . . . either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordered."

The past 30 years of joint federal-state regulation of telephony clearly demonstrates that the nature of the subject matter does not necessitate federal preemption. Nor has Congress "unmistakably . . . ordered" federal preemption of intrastate telephone communications. In fact, Section 2(b) of the Communications Act reflects the exact opposite intent. Thus, in order to avoid further erosion of established standards for federal preemption, certiorari should be granted.

1. Certiorari Should Be Granted Because of the Nature and Importance of the Jurisdictional Issue.

The FCC's usurption of California's authority in this case presents a delicate issue of federal-state relations. The Court has repeatedly granted certiorari when federal power is invoked to override powers historically exercised by the states.[10]

The imperative for Supreme Court review in cases of asserted federal preemption applies with special force to the instant case. Practically all telephone facilities in the United States are interconnected and used interchangeably for both interstate and intrastate messages. If the holding of the Court below is permitted to stand, the specter of intervention will hang constantly over the regulatory processes of each individual state. Continuing the trend illustrated by the *Telerent* decision,

[10]*E.g., FPC* v. *Conway Corp.,* 426 U.S. 271 (1976); *Chemehuevi Tribe of Indians* v. *FPC,* 420 U.S. 395 (1975); *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968); *FTC* v. *Bunte Bros.,* 312 U.S. 349 (1941); *Rice* v. *Board of Trade,* 331 U.S. 247 (1947).

supra, the FCC will undoubtedly assert the power to abrogate state authority over intrastate telephone rates, services and facilities whenever, in its sole opinion, such preemption would best serve the national public interest.

The telephone companies will likewise be placed in an untenable position. To illustrate the quandry, the Court need only consider the result of this case. The California Commission's policy is to maintain local exchange rates for the general body of customers at the lowest possible level through subsidization from services such as FX. On the other hand, the FCC's policy is to promote competition by pricing interstate private line and other special services on a cost basis. Because of these divergent policies, California intrastate private line rates are priced several times higher per circuit mile than interstate rates. Companies such as American Airlines, which maintain interstate networks with linking intrastate lines will, as a result of this case, switch to specialized common carriers, such as SPCC, as a matter of business economics.

The record reflects that telephone companies in California will suffer a fifteen million dollar annual revenue loss by reason of the FCC's order in this case. (Ct. of App. Jt. App. Vol. 2 p. 247). This revenue deficiency can only be made up by general rate increases on exchange and other intrastate services. The savings which will accrue to large users will ultimately come out of the pocket of the average residence telephone user. Consequently, the inequities of this case present a public interest issue of national magnitude.[11] The general body of telephone users (i.e., the American public) is entitled to a determination by this Court as to whether the FCC or the individual states should control intrastate rate policies.

[11]This Court has traditionally granted certiorari in cases involving principles which are of importance to the general public, as distinguished from the parties alone. *Rice* v. *Sioux City Memorial Parks Cemetery,* 349 U.S. 70 (1955).

2. The Decision Below Misconstrues the Communications Act's Reservation of State Jurisdiction and Disregards Long-Standing Rules of Statutory Construction Established By This Court.

Certiorari is further justified because of basic legal errors in the majority opinion. The decision below, sustaining the FCC's claim of jurisdiction, is literally irreconcilable with the plain language of the Communications Act. Further, it disregards the Act's legislative history and decisions of this Court which hold that long-standing state regulation is not to be preempted without the clearest evidence that Congress intended such displacement.

Initially, the language of the statute must be examined to ascertain its meaning. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). The language of Section 2(b) of the Communications Act is quite clear. It reads in pertinent part:

> "Subject to the provisions of section 301 [regarding the licensing of radio frequency uses], *nothing in this Act shall be construed* to apply or to *give the Commission jurisdiction* with respect to . . . charges, classifications, practices, *services, facilities*, or regulations *for or in connection with intrastate communication service* . . ." *(EMPHASIS ADDED.)*

The emphasized language absolutely precludes the FCC from regulating intrastate FX service or the facilities used to provide such service. The section contains no caveat authorizing federal preemption in the event of a federal-state policy conflict nor does the fact that facilities may also be used to carry interstate messages vest the FCC with more than concurrent jurisdiction.

The FCC, to justify its action preempting state jurisdiction, relies heavily upon Title I, Section 1 of the Act, 47 U.S.C. 151. That section is a statement of general objectives to be achieved by the FCC through regulation of interstate commerce, as provided by Titles II and III.[12] However, the Commission

[12] Section 1 states, *inter alia*, that the purpose of the Act is to provide nationwide wire "communication service with adequate facilities at reasonable charges."

cannot impose the general goals of Section 1 in an unlimited fashion upon intrastate commerce in view of the fact that its jurisdiction is explicitly limited by Section 2. Otherwise, Section 2 becomes meaningless. It is an elementary rule of statutory construction that specific terms prevail over general terms which might otherwise control. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957). Nevertheless, the FCC, in this case, has ignored this rule and has almost totally denuded the more specific Section 2(b) of its plain meaning by construing it to refer only to those services and facilities used exclusively for intrastate communications. This interpretation of the statute is irrevocably in conflict with the express statutory language that "*nothing* in the Act" shall be construed to give the Commission jurisdiction with respect to "services or facilities *for or in connection with* intrastate communication." The words *in connection with* can only refer to facilities communally used for interstate and intrastate messages. Therefore the power balance in event of controversy rests in the states, not the FCC.

Moreover, if a statute is reasonably susceptible to more than one meaning, the court must consult, not only the language, but also felt and openly articulated concerns which motivated the framers of that law. *National Petroleum Refiners Ass'n* v. *FTC*, 482 F. 2d 672, 690 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1974). The legislative history of the Communications Act supports a reservation of jurisdiction in the states for all services and facilities in connection with intrastate commerce. At the time federal interstate regulation was considered, the states rightfully anticipated that the FCC would eventually reach for preemptive power. Congress responded to those concerns by adding, in Section 2(b) and 221(b),[13] language which it contemplated would absolutely preclude FCC preemption of intrastate regulation.

[13] Section 221(b) vests regulation authority in the states with respect to telephone exchanges bridging state lines.

The Communications Act of 1934 had its roots in bills introduced by Senator Couzens, Chairman of the Senate Committee on Interstate Commerce in 1928 and 1929.[14] These bills, as originally drafted, incorporated the so-called *Shreveport* Doctrine and would have allowed the federal commission to regulate intrastate commerce when necessary to protect interstate commerce. Thirty-seven states and their national association, predecessor of the NARUC, adopted resolutions opposing the original bills and vehemently opposed any legislation that might empower the FCC to supersede existing state jurisdiction in the communications field.[15] In response to the states' protest the bills were revised to incorporate provisions designed to protect the state commissions from being overriden by the FCC and the states thereupon withdrew their opposition.[16]

The chronology of the legislative resolution of the regulatory balance of power issue is well summarized in the testimony of John E. Benton, General Solicitor of the NARUC, given at the hearings:

> "Unless the Congress wishes to bring control of local telephone business, which is now subject to State regulation under the domination of the new commission, it cannot merely transfer the existing power of the Interstate Commerce Commission to this new commission. It must describe the field within which the new commission shall operate.

[14]S. 2041, 70th Cong., 1st Sess. introduced Jan. 4, 1928, 69 Cong. Rec. 928, S. 6, 71st Cong., 1st Sess. introduced April 18, 1929, 71 Cong. Rec. 102.

[15]Hearings on S. 6 before the Senate Committee on Interstate Commerce, 71st Cong., 1st Sess. 2167-68 (1930).

[16]Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73 Cong. 2d Sess. 136 (1934); S.Rep.No. 781, 73d Cong. 2d Sess. 3 (1934).

> "The Couzens communications commission bill, in the Seventy-First Congress, as that bill was first introduced, did not do that. It proposed to transfer the present powers of the Interstate Commerce Commission to the new commission unchanged. The State commissions were greatly alarmed. The national association in convention by unanimous action adopted a resolution protesting against the passage of the bill and 37 State commissions by resolution or otherwise took separate action in opposition. They were heard at great length against the bill before the Senate Committee; and I think we are justified in believing that we satisfied the committee that no Federal commission ought to be given powers which would enable it to interfere with State regulation."
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> * * *
>
> "This bill has been drawn with care to safeguard State power to regulate local telephone service. It has been carefully considered by our executive and legislative committee representatives and has met their approval. They believe that it provides for effective Federal regulation where Federal regulation is necessary, and that it safeguards State regulation." Hearings H.R. 8301 at 136.

The legislative history of the Congress' intent could not be more clear. Yet the FCC, in an effort to broaden the markets of the specialized common carriers, has deliberately asserted preemptive jurisdiction over intrastate foreign exchange rates in this case and the District of Columbia Court of Appeals, relying on *Telerent*, has perfunctorily endorsed FCC jurisdiction.

Moreover, the appellate court, by ignoring the obvious purport of Section 2(b), its legislative history and prior regulatory history, has contradicted this Court's repeated directive that state and local regulatory control should not be superseded without the clearest expression of Congressional intent. "As a matter of statutory construction Congressional intention to

displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated. . . ." *Mauer* v. *Hamilton*, 309 U.S. 598, 614 (1940). This rule mirrors Congress' own policy of preserving state authority over "matters heretofore left to local custom or local law." *FTC* v. *Bunte Bros., Inc., supra*, 312 U.S. at p. 354.

Unvarnished, the facts disclose here an improper assertion of power on the part of the FCC which should not be condoned by this Court. Certainly, there exists no "clear and manifest purpose" of Congress to oust state control over intrastate foreign exchange service merely because the same facilities may be employed for interstate service. On the contrary, the language of the Act, its structuring of Title II authority, and its legislative history all reflect that Congress intended state regulatory power to "remain unimpaired." *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 152 (1963).

3. Federal Preemption Was Not Warranted Under the Circumstances of This Case.

Certiorari is warranted for yet another reason. Even if Section 1 confers federal preemptive authority, the law requires, as pointed out by the dissent in the Appeals Court, that it be exercised only when circumstances make it unavoidable. The record in this case is totally devoid of evidence supporting such an imperative.

The FCC in its order intitiated its anaylsis of the jurisdictional issue by noting that interstate communications would be transmitted over the physical intrastate FX facilities. For this reason the FCC labeled the facilities interstate and then employed that characterization to preempt entirely all state jurisdiction over FX services provided over the facilities.

In the pleadings to the FCC, it was suggested that a federal-state regulatory conflict could be avoided by limiting transmissions over SPCC's line to interstate calls, leaving intrastate transmissions to a separate FX line which would be

subject to state regulation. Responding to this possible solution, the FCC opined that such an arrangement would not be in the national public interest and would, therefore, conflict with its mandate under Section 1 because it would require the customer to maintain redundant facilities. The Commission did not and could not cite evidence to support its conclusion as none was contained in the record. This finding, the only averment to the necessity for preemption (if it can be labeled such) in the Commission's opinion, is, as Judge Robinson put it "a far cry from what is required."

Absent federal legislation regulating commerce not admitting of diversity of treatment and therefore requiring uniformity of regulation, the states retain a wide range for permissible exercise of regulatory power, even though interstate commerce may be affected. The *Minnesota Rate Cases*, 230 U.S. 352, 398-402 (1913). Furthermore, state commissions retain jurisdictional authority over intrastate services even though common carriers may use the same facilities for providing interstate service. *Texas & CRR* v. *Northside Ry.*, 276 U.S. 475, 480 (1928). As stated in the *Minnesota Rate Cases*, at page 432, the "inter-blending of operations in the conduct of interstate and local business by interstate carriers" does not serve to oust state commissions of their authority to regulate in the public interest. Consequently, if the Communications Act does not preclude the FCC from asserting preemptive jurisdiction over intrastate communications services, then its justification for the exercise of that power must be imperative and clearly apparent from the record.[17]

The FCC has not provided evidentiary findings showing continued state regulation of intrastate FX service would be incompatible with, constitute, a burden on, or irreconcilably conflict with its regulation of interstate private line services. Its conclusion that a jurisdictional "split" of FX service would be

[17]See cases cited in Footnote 10 and in Judge Robinson's dissent.

"technically and practically difficult" is unsupported. And even if correct, would not substantiate the abrogation of state regulation. *National Association of Reg. Util. Comrs.* v. *FCC*, 533 F. 2d 601 (D.C. Cir. 1976).

The FCC was not empowered to preempt state regulation of intrastate FX service without first establishing, after an evidentiary hearing and full consideration of all relevant factors, that such action was unavoidably necessary to protect the availability of interstate private line communications. Cf. *North Carolina* v. *United States*, 325 U.S. 507 (1945); *Panhandle Eastern Pipeline Co.* v. *Michigan Public Service Com'n.*, 341 U.S. 329 (1950). Its failure to do so has clearly violated the parties' right to due process and has fatally marred the validity of its order. *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

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BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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v.

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THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,*

v.

FEDERAL COMMUNCATIONS COMMISSION and THE UNITED STATES OF AMERICA, et al., *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1-15) [1] is not yet reported. The memorandum opinion

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[1] "Pet.App." refers to "Petitioners' Joint Appendices".

and order of the Federal Communications Commission (Pet.App. 16-44) is reported at 56 F.C.C.2d 14 (1975).

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1977 (Pet.App. 3). The petition in No. 77-406 was filed on September 15, 1977, and the petition in No. 77-434 was filed on September 19, 1977. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. 1254(1); Sections 402(a) and 405(j) of the Communications Act of 1934, as amended 47 U.S.C. 402(a), 405(j); and 28 U.S.C. 2341, 2344, and 2350.

QUESTION PRESENTED

Whether the Federal Communications Commission possesses and properly asserts statutory authority to regulate facilities located within one state which are used to provide both interstate and intrastate communications, where the FCC concludes that it is contrary to the public interest and technically and practically difficult to separate the facilities between interstate and intrastate communications functions.

STATEMENT

A. Background

In 1971, on the basis of a comprehensive rule making proceeding, the FCC adopted a general policy in favor of the free entry of new common carriers into the business of providing specialized communications service.[2] The FCC reaffirmed its view that the established carriers, which had earlier manifested "intransigence" towards interconnecting its facilities with those of the first specialized carrier to make application,[3] should permit interconnection of intercity and local distribution facilities on reasonable terms and conditions to the facilities of the new carriers.[4] This decision was affirmed by the Ninth Circuit.[5]

Thereafter, in 1974, the FCC held that Bell and the Associated Bell System Companies had engaged in unlawful conduct in refusing or delaying to provide the physical interconnection of their facilities necessary for the specialized carriers to provide their authorized services, and directed AT&T and the Bell Companies to furnish to specialized carriers the interconnection facilities essential to the rendition of all of their authorized services.[6] Included among these authorized services were Foreign Exchange (FX) service[7] and Common Control Switching Arrange-

[2] *Specialized Common Carrier Inquiry*, 29 F.C.C.2d 870 (1971), reconsideration denied, 31 F.C.C.2d 1106 (1971).

[3] *MCI Telecommunications, Inc.*, Initial Decision, 18 F.C.C.2d 979, 1007 (1967), Decision, 18 F.C.C.2d 953, 965 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

[4] Note 2 supra, 29 F.C.C.2d at 940.

[5] *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1975).

[6] *Bell System Tariff Offerings*, 46 F.C.C.2d 413, 435-36, 438 (1974).

[7] Foreign exchange (FX) is a private line service that is partially "switched", permitting a telephone subscriber in one exchange to maintain a local telephone in another exchange area as if his telephone were actually located in that other exchange area. 46 F.C.C. 2d at 418 fn. 5; National Association of Regulatory Utility Commissioners (NARUC) petition, at 4-5, fn. 4.

ments (CCSA).[8] This decision was affirmed by the Third Circuit.[9]

In 1971 the FCC also issued a declaratory ruling that the Communications Act of 1934, as amended,[10] preempts state regulation of the terms and conditions of the interconnection of facilities (in that case telephone terminal equipment) used for both interstate and intrastate communications services, when the state or local regulation conflicts with Federal regulation of those facilities.[11] That decision was affirmed by the Fourth Circuit,[12] and in collateral cases by the First Circuit [13] and the Supreme Court of Nebraska.[14]

In 1975 and 1976 the FCC exercised its primary authority over facilities used in both interstate and intrastate communications to establish a terminal equipment registration program, precluding incon-

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[8] A CCSA is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through a switchboard on the customer's premises. 46 F.C.C.2d at 418 fn. 5; NARUC petition at 5 fn. 5.

[9] *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975).

[10] 47 U.S.C. 151 et seq.

[11] *Telerant Leasing Corp.*, 45 F.C.C.2d 204 (1974).

[12] *North Carolina Utilities Commission* v. *FCC (North Carolina I)*, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976).

[13] *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[14] *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (1975).

sistent state and local regulation.[15] These decisions were also affirmed by by the Fourth Circuit.[16]

B. Facts of the Case

The present case involves facilities located in California which are used by a customer of Southern Pacific Communications Company (SPCC) for its national FX-CCSA communications network.[17] SPCC provides an interstate coast-to-coast specialized communications service, including FX and CCSA service, under authorizations and radio licenses issued by the FCC pursuant to its *Specialized Common Carrier* decision.[18] SPCC also holds a California intrastate certificate of convenience and necessity issued by a petitioner herein, the Public Utilities Commission of the State of California (CPUC), under an interim opinion which precludes SPCC from "[a]ny connection of private line circuits to the exchange network", including "any connection similar to foreign exchange service." [19]

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[15] *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, First Report and Order, 56 F.C.C.2d 593 (1975), Second Report and Order, 58 F.C.C.2d 736 (1976).

[16] *North Carolina Utilities Commission* v. *FCC (North Carolina II)*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, No. 76-1675, 46 L.W. 3191 (Oct. 3, 1977).

[17] The Commission's decision under review is applicable to interconnections in both California and Oklahoma. 56 F.C.C.2d at 14-25 (Pet.App. 16-44) passim. However, since petitioners have addressed themselves only to the facilities in California, SPCC's brief in opposition will be directed only to those facilities.

[18] Note 2 supra.

[19] *Pacific Telephone and Telegraph Co.* v. *Southern Pacific Communications Co.*, Decision No. 84167 (Cal. PUC Mar. 4, 1975) (Pet. App. 45-124, at 114).

Acting solely in reliance upon its authorizations and licenses issued under the statutory jurisdiction and orders of the FCC, and not in any part in reliance upon its intrastate certificate issued by CPUC, SPCC in March, 1975, ordered interconnection facilities from the Pacific Telephone and Telegraph Company (PT&T) to connect the SPCC private line circuit between San Diego and Los Angeles to a CCSA switching machine at Los Angeles, so as to provide access by a CCSA network of American Airlines which stretches across the United States. Until the interconnection, the nationwide private line network of American Airlines stopped at Los Angeles, and could not reach San Diego. With the interconnection, a call could originate anywhere in the United States, including locations in California, on the CCSA network of American Airlines; be carried over intermachine trunk lines to the Los Angeles CCSA switcher; and be carried over SPCC lines from Los Angeles to SPCC's terminal in San Diego and over a leased PT&T local distribution facility to a customer's premises in San Diego. It was estimated that 82% of the calls on the American Airlines network terminating at San Diego would in fact be originated from points outside of the State of California.

Although advised by SPCC that it was relying solely on its FCC authorizations, and by the FCC's Common Carrier Bureau that in the Bureau's view the interconnection sought by SPCC was interstate in character subject to FCC jurisdiction, PT&T filed a complaint with the CPUC alleging SPCC's action in seeking interconnection was "in direct and flagrant

violation" of the CPUC's prohibition on intrastate FX service by SPCC.[10]

C. The FCC Proceeding

SPCC thereupon filed a petition on June 16, 1975, with the FCC for declaratory rulings to reaffirm the primacy of the FCC's jurisdiction over the facilities, and for enforcement of the earlier cease and desist orders requiring AT&T and the Associated Bell System Companies to furnish FX and CCSA interconnection on reasonable terms and conditions. Comments in opposition were filed jointly by AT&T, PT&T, and Southwestern Bell Telephone Company, and by NARUC, CPUC, and the United States Independent Telephone Association (USITA).

On October 9, 1975, the FCC issued a memorandum opinion and order affirming its jurisdiction over the facilities. The FCC ruled it would be inappropriate to await the outcome of state proceedings or to convene a Federal-State Joint Board, since SPCC's petition presented the legal question of jurisdiction whether the facilities were interstate, which did not require state interpretations. 56 F.C.C.2d at 18, Pet. App. at 25-26. The FCC described and analyzed the California facilities as "part of dedicated interstate private line networks", 56 F.C.C.2d at 19, Pet.App. at 27, and as "an integral part of a dedicated interstate communications network." 56 F.C.C.2d at 21, Pet. App. at 32. The FCC refused to limit the use of the facilities to interstate communications. It found that leaving intrastate transmissions to a separate FX

[10] The complaint is attached to the FCC's ruling, 56 F.C.C.2d at 22-23, Pet.App. at 35-39.

line subject to state restrictions would require the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts. This was "clearly not in the public interest" and contrary to the mandate of Section 1 of the Communications Act[21] to make available a rapid, efficient, unified national communications service, 56 F.C.C.2d at 19, Pet.App. at 28. It was found to be "technically and practically difficult" to "split" the facilities between interstate and intrastate transmission functions. 56 F.C.C.2d at 19, Pet.App. at 29. The FCC ruled that the facilities were interstate, even though capable of intrastate service as well, and thus under Federal jurisdiction, 56 F.C.C.2d at 21, Pet. App. at 32. While the FCC therefore required the Associated Bell System Companies to interconnect its local facilities to the SPCC private lines as an intrastate segment of the interstate service, it made clear that it did not intend to assume jurisdiction over local exchange telephone service, 56 F.C.C.2d at 21, Pet. App. at 33.

D. Decision of the Court of Appeals

On petitions for review, the District of Columbia Circuit (Chief Judge Bazelon and Circuit Judge Tamm for the majority) held that the FCC did not exceed its authority in asserting jurisdiction over the facilities, located entirely within a state but used for both interstate and intrastate communications; that the FCC reasonably concluded it was technically difficult and impractical to separate the facilities between their interstate and intrastate functions; that the

[21] 47 U.S.C. 151.

FCC's position that the physical location of the facilities was not determinative was logical and supported by substantial authority; and, quoting from the Fourth Circuit,[22] that the FCC's declaration of authority over the interconnection of the facilities with the national network was "a proper and reasonable assertion of jurisdiction conferred by the Act." Pet.App. at 1-6. Circuit Judge Robinson, dissenting, argued that the record before the FCC was inadequate to support the FCC's ruling that it was "technically and practically difficult" to separate interstate FX and intrastate FX. Pet.App. at 7-15.

ARGUMENT

1. The decision of the District of Columbia Circuit is consistent with applicable decisions of this Court and reflects the direct application of settled law governing federal-state relationships under circumstances where federal and state regulations are inconsistent.

One hundred and fifty years after *Gibbons* v. *Ogden*,[23] it is not necessary that this Court now examine again the doctrine that Federal law is paramount over inconsistent state regulation affecting interstate commerce. Where Federal and State regulations impose conflicting duties on a carrier, "one must yield, and that one is the state law."[24] It is an "elementary and long settled doctrine" that "there can be no divided authority over interstate commerce and that the regu-

[22] Note 12 supra, 537 F.2d at 794.

[23] 9 Wheaton (22 U.S.) 1 (1824).

[24] *Gulf, Colorado & S.F. Ry. Co.* v. *Hefley*, 158 U.S. 98, 103 (1895).

lations of Congress on that subject are supreme."[25] Where interstate and intrastate services are inextricably intertwined, so that the efficient performance of either is dependent upon the efficient performance of the system as a whole, state regulation of intrastate service is subordinate to the performance by the carrier of its Federal duty to render efficiently services in interstate commerce.[26]

Under the commerce clause, the FCC has been given expansive powers by the Congress. The FCC serves as "the single Government agency" with "unified jurisdiction" and broad regulatory authority over all forms of electrical communication.[27] It "is confirmed by the language of the statute and by judicial decisions" that the Communications Act contemplates the regulation of interstate communications "from its inception to its completion" at the ultimate destination.[28]

Petitioners are wholly incorrect in suggesting that the FCC did not give proper recognition to the intrastate use of the facilities, or proper deference to the role of the states in the Federal system. The FCC explicitly acknowledged that the facilities were used for both interstate and intrastate communications, and

[25] *Chicago, R.I. & P. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913).

[26] *Colorado* v. *United States*, 271 U.S. 153, 164-66 (1926).

[27] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968).

[28] *United States* v. *AT&T*, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), affirmed, *Hotel Astor, Inc.* v. *United States*, 325 U.S. 837 (1945).

that while the facilities were designed to interconnect by switches with the interstate CCSA network, "the lines may be utilized alternatively to access a foreign telephone exchange located within the same state as the customer's terminal facilities." 56 F.C.C.2d at 19, Pet.App. at 27. The FCC specifically recognized that Section 2(b) of the Communications Act[29] denies it jurisdiction over intrastate communications, and expressly disclaimed any intent to assume jurisdiction over local exchange service, 56 F.C.C.2d at 21, Pet. App. at 33. What the FCC could not tolerate, however, were restrictions on authorized FX service which would frustrate the Congressional intent expressed in the Communications Act to make available an efficient, unified, nationwide communication service. 56 F.C.C. 2d at 19, 20, Pet. App. at 28, 29.

2. The FCC's decision affirmed on review by the District of Columbia Circuit is not in conflict with the statutory scheme or legislative history of the Communications Act.

Before the passage of the Communications Act of 1934, Federal regulation of communications facilities was not centered in one government body, although they were "inextricably intertwined in communication", and the responsibility for regulation was scattered without any governmental agency authorized to deal with communications problems as such.[30] The purpose of the Act was "to create a communication commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph,

[29] 47 U.S.C. 152(b).

[30] "Study of Communications By an Interdepartmental Committee", 73rd Cong., 2d Sess. 6-7 (1934).

cable, or radio. * * * There is a vital need for one commission with unified jurisdiction over all of these methods of communication." [31] The First Vice President and Chairman of the Executive Committee of NARUC testified before House and Senate committees: [32]

> We endorse the principle of this bill, because it specifically reserves to the State Governments their rightful powers over *matters of purely State concern,* such as so-called "exchange" or local rates of telephone companies. [Emphasis added]

The arguments of petitioners that Sections 2(b) and 221(b) of the Communications Act [33] preclude the FCC's exercise of any jurisdiction over intrastate facilities, whether or not a segment of interstate communication, were carefully considered by the Fourth Circuit in *North Carolina I* [34] and *North Carolina II* [35] and in both cases rejected by a majority of the Court. In *North Carolina I* (by Senior Circuit Judges Hastie and Tuttle, sitting by designation, Circuit Judge Widener dissenting), it was noted that the FCC for some 30 years, without Congressional interference, had viewed and treated Section 2(b) of the Act as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and

[31] Sen. Rept. No. 781, 73d Cong. 2d Sess. 1 (1934).

[32] Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 132 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess. 156 (1934).

[33] 47 U.S.C. 152(b), 221(b).

[34] Note 12 supra.

[35] Note 16 supra.

interstate telephone communications.[36] In *North Carolina II* (by Senior Circuit Judges Tuttle and Rives, sitting by designation, Circuit Judge Widener dissenting), the Court of Appeals held that just as the FCC has full statutory authority to regulate interstate-intrastate equipment to ensure the safety of the national network, there can be no statutory basis for the argument that FCC regulations serving other important interests of national communications policy are subject to state utility commissions.[37] Both decisions recognize that Section 221(b) is no bar, since its purpose is only to enable state commissions to regulate local exchange service in metropolitan areas extending across state boundaries.[38]

This Court has denied petitions for write of certiorari in both *North Carolina* cases.[39] No reason is presented to suggest a change of circumstances which would make the grant of the writ more appropriate at this time.

3. The decision of the District of Columbia Circuit is consistent with, and a direct lineal descendant of, the decisions of other Courts of Appeals.

The decision below implements the principles established in the decision of the Ninth Circuit affirming the authorization of specialized carriers and requiring established carriers to interconnect their fa-

[36] Note 12 supra, 537 F.2d at 794-95.

[37] Note 16 supra, 552 F.2d at 1046-47.

[38] Note 12 supra, 537 F.2d at 795 and fn. 11; Note 16 supra, 552 F.2d at 1045.

[39] Notes 12 and 16 supra.

cilities;[40] the decision of the Third Circuit affirming the FCC's requirement that the established carriers must provide interconnection of FX and CCSA facilities;[41] and two decisions of the Fourth Circuit,[42] as well as a collateral decision of the First Circuit,[43] affirming FCC jurisdiction over facilities used in both interstate and intrastate communications. Certiorari having been sought and denied in the Ninth, Third, and two Fourth Circuit decisions, and not sought in the First Circuit case, there clearly is no basis for a grant of the writ in this case.

4. This case presents no important question of federal law, but rather a question of fact correctly resolved by the FCC.

The thrust of the petitions for a writ of certiorari is directed to a *factual* issue, whether the record was adequate for the FCC to have found that it was technically difficult to "split" the facilities so that one set of facilities would be used for interstate FX lines, and another set of facilities subject to state restrictions for intrastate use. Petitioners' objections were fully presented to and considered by the FCC. Bringing to bear on this question "the deposit of its experience, the disciplined feel of the expert",[44] the FCC concluded that requiring the customer to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts was clearly not in the public interest and would violate its

[40] Note 5 supra.

[41] Note 9 supra.

[42] Notes 12, 16 supra.

[43] Note 13 supra.

[44] See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1953).

statutory mandate to make available a unified, nationwide communication service. 56 F.C.C.2d at 19-20, Pet.App. at 28-30. The majority of the District of Columbia Circuit panel held that the FCC had "reasonably concluded" that it was impractical to separate interstate FX from intrastate FX service in this case. Pet.App. at 6.[45]

It requires no evidentiary hearing for the FCC to recognize that if interstate facilities were required to be separated, a customer seeking to obtain both services would be required to maintain two separate redundant facilities (one for interstate FX service, and one for intrastate FX service), and to incur the expense for additional equipment to restrict calls. When the same issue was raised in *North Carolina I* with respect to terminal equipment rather than the end segments of circuits, Senior Circuit Judge Hastie observed:[46]

> Usually it is not feasible, as a matter of economics and practicality of operation, to limit the use of such equipment to either interstate or intrastate transmissions.

[45] *AT&T* v. *FCC*, 551 F.2d 1287 (D.C. Cir. 1977), cited by CPUC (Pet. at 19-20) is inapposite. The issue in that case was a factual dispute whether a manual mobile telephone system adversely affected dial mobile service, where there was a conflict in the information furnished by the parties, not the practicability of separating interstate and intrastate service by the same facilities. Significantly, Chief Judge Bazelon supported the Court's opinion in both cases, obviously perceiving no inconsistency, and Circuit Judge Robinson, dissenting in this case, did not invoke the mobile telephone case in which he had also participated.

[46] Note 12 supra, 537 F.2d at 791.

In this regard, CPUC, a petitioner here, has itself earlier said, in granting SPCC its limited intrastate certificate of convenience and necessity:[47]

> No telephone corporation would ever build tandem interstate-intrastate systems. The waste involved would be monumental.

Not only is the FCC's conclusion patently reasonable and correct, but in any event, this is not the type of issue which could profitably engage the attention of this Court.

5. Petitioners err in suggesting that there are any special or important reasons for review.

No important principles of law that have not long been settled are involved. Several Circuit Courts have considered the same questions and reached the same results, without certiorari being granted. The amounts and business involved represent only an insignificant fraction of the revenues and business of PT&T, the complaining carrier. The Fourth Circuit said in *North Carolina II*[48] that

> petitioners cannot create an economic impact with the volume of their jeremiad. Their claims of economic impact are refrains of assertions that the FCC has consistently found to be unsubstantiated by evidence, conclusory, and based on unrealistic assumptions about market behavior. [Citations.]

In any event, if there is any adverse impact upon the local user, the matter is readily remedied by an adjustment in "jurisdictional separations" of inter-

[47] Note 19 supra, Pet.App. at 68.

[48] Note 16 supra, 552 F.2d at 1055-56.

state and intrastate revenues, and is under continuing review by the FCC.[49]

The decision of the District of Columbia Circuit serves a larger purpose in the public interest, in permitting both established and new communications carriers to engage in fuller and freer competition in providing specialized services, and in furthering the mandate of Section 1 of the Communications Act to provide a rapid, efficient, nationwide communications service with adequate facilities at reasonable charges.[50] A grant of the petitions for a writ of certiorari has not been justified.

[49] See *Specialized Common Carrier Inquiry*, note 2 supra, on reconsideration, 31 F.C.C.2d at 1108; *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, 46 F.C.C.2d 214 (1974), 50 F.C.C.2d 574 (1974), 61 F.C.C.2d 766 (1976).

[50] 47 U.S.C. 151.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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On Petitions for a Writ of Certiorari to the
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BRIEF IN OPPOSITION FOR RESPONDENT AERONAUTICAL RADIO, INC.

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BRIEF IN OPPOSITION FOR RESPONDENT AERONAUTICAL RADIO, INC.

OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. 1-15)[1] is not yet reported. The Court of Appeals affirmed the decision of the Federal Communications Commission (FCC) (Pet. App. 16-44) which is reported at 56 F.C.C.2d 14 (1975).

JURISDICTION

Petitioners seek review by this Court pursuant to 28 U.S.C. § 1524.

QUESTION PRESENTED

Whether the Federal Communications Commission possesses the statutory authority to regulate facilities located within one state which are used to provide both interstate and intrastate communications, where the FCC concludes that it is clearly not in the public interest and technically impracticable to require duplicative facilities to separate interstate from intrastate communications functions.

STATEMENT

Aeronautical Radio, Inc. (ARINC) was formed in 1929 by the airline industry at the suggestion of the Federal Radio Commission (the predecessor of the Federal Communications Commission) for the purpose of promoting the safety of flight by coordinating and assuring effective communications for the air transport industry. In furtherance of this objective, ARINC obtains from the various communications common carriers a complex, nationwide network of private line facilities,[2] including the CCSA network[3] used to support the operations of American Airlines at issue in this proceeding.

[1] "Pet. App." refers to "Petitioners' Joint Appendices."

As the customer for the disputed circuit, ARINC is vitally affected by any action which may lessen its ability to obtain the interstate communications services it requires. Nonetheless, rather than detail the procedural history of this case, ARINC adopts the Statements appearing in the Brief of the Federal Communications Commission and the United States of America in Opposition (Government Brief) and the Brief for Respondent Southern Pacific Communications Company in Opposition (SPCC Brief). In addition, ARINC wishes to supplement those Statements with a description of ARINC's communications services on behalf of the entire air transport industry and the critical need of that industry for an integrated, nationwide communications system essential to the safety, regularity and economy of modern air transportation.

Perhaps more than any other sector of the nation's economy, the air transport industry demands extensive and specialized communications systems to meet its unique requirements. Today, the safe and efficient movement of high-speed aircraft, and the passengers and cargo they carry, depends upon complex, nation-

[2] A map depicting the point-to-point private line requirements of the air transport industry supplied through ARINC's Private Line Intercity Network (PLIN) is shown in the Addendum *infra*.

[3] Common Control Switching Arrangement is a private line switching arrangement available from the Bell System which provides a customer with an integrated communications network linking such offices or other locations throughout the country as the customer may desire.

wide networks of dedicated private line services and sophisticated computer and communications facilities.

The air transport industry uses a vast nationwide array of both public and private line communications channels to link together aircraft on the ground and in flight, administrative offices, ticket counters, computer centers, maintenance bases, and parts depots. While ARINC thus provides a wide range of aeronautical communications services necessary to meet the industry's requirements, those most relevant to the pending proceeding are the networks of interconnected private line circuits leased by ARINC from communications common carriers, including American Telephone and Telegraph Company (AT&T) and SPCC. Indeed, ARINC is today the *largest* private customer of AT&T for such interstate private line services, and is also a substantial customer of the various specialized common carriers, with the matrix of private line circuits used by the airline industry consisting of almost 5 million circuit-miles, linking together some 3,400 city pairs across the nation. ARINC processes an average of 1,000 to 1,200 changes in this vast system each month.

In connection with its complex private line networks, the aviation community is also a major user of a specific type of private line communications service —"foreign exchange" or "FX" service. Essentially, FX private line service permits an individual situated outside of a particular local exchange area to obtain exchange telephone service in that area just as if his telephone were actually located there.

Like all private line services, FX service is fundamentally distinct from the public Message Telephone

Service (MTS) which the telephone companies provide to their ordinary subscribers.[4] Under MTS, all calls beyond the local exchange area are metered separately and subject to an individual toll charge above and beyond the rate set for local service. While FX private line service, by definition, involves message traffic beyond the confines of a single exchange area, the FX customer pays a single flat rate covering the cost of the dedicated private line, irrespective of whether he makes or receives one, none, or many calls (up to the technical capacity of the line) during the billing period.

The nation's airline industry is utterly dependent upon FX private line services integrated into its networks of private line circuits. While but one of many possible examples, the indispensable role played by such FX service is perhaps best illustrated by the intricate and complex reservations/information systems maintained by major air carriers today.

Such systems are based upon an extensive network of FX lines which funnel reservation calls and requests for information into either a limited number of regional or a single centralized reservation center. An individual can call a local telephone number in the town or city where he lives and, through the network of FX and other private lines, may actually speak with an agent at a central reservations center a thousand miles away. To the individual, however, the phone call he made was only a local one, with no additional toll charges.

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[4] The Third Circuit has found that private line services include FX and CCSA. Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

At the reservations center, incoming calls are automatically and efficiently distributed among a number of available agents. This creates obvious economies in agent utilization and assures that people throughout the nation, even in smaller communities, are able to contact the airlines to secure space or information concerning flights.

Some airlines also balance reservations traffic at peak times between various regional centers, both nearby and across the continent, to assure the best service to the public. By this technique, calls which would ordinarily go to one reservation center are automatically switched to another regional center over private lines when all agents are busy at the first center. Thus, a message which at one point in time might not cross a state line, may very well be an interstate transmission just a few minutes later.

In addition to public convenience, the reservations systems also play an important role in the safety and economy of aircraft operations. Because the system permits optimum utilization of equipment, the associated costs of operation can be held at a minimum. Also, the data stored in the reservations computers are used by air carriers for vital aircraft weight, balance, and fuel requirement calculations, as well as for crew scheduling.

Another example of the industry's need for integrated FX service—and one of particular significance to this case—is the private line CCSA communications networks maintained by several airlines for administrative purposes. The nationwide operations of many carriers make efficient intercommunication among company personnel of paramount concern. While

routinely employed for general administration, these are the same facilities used during extreme emergencies, such as aircraft accidents or hijackings, to coordinate the activities of the carrier, other airlines, the FAA, and other agencies. Significantly, the California circuit involved in the Commission Order affirmed below was ordered from SPCC for use by American Airlines in order to extend just such a multistate administrative CCSA network from Los Angeles to San Diego.

The special communications requirements of the air transport industry involve an immense and ever-changing combination of FX, CCSA and other private line services. And since San Diego is only one hour and fifty-five minutes from Denver by scheduled airline and Tulsa is less than three hours from New York City, airline communications management can be handled only on a national and regional basis to assure that overall operations are integrated to the fullest extent practicable. Clearly, consistent and uniform national policies governing interstate private line communications networks are essential to the planning and development of airline communications systems upon which the safety, regularity and economy of modern air transportation depend.

ARGUMENT

ARINC adopts and hereby incorporates and consolidates the Argument appearing in the Government Brief and the Argument appearing in the SPCC Brief. As is shown in the Government Brief and the SPCC Brief, there are no special and important reasons for review by this Court, and none of the factors identi-

fied in Supreme Court Rule 19(1)(b) for federal court of appeals cases meriting review on certiorari are presented here.

ARINC wishes to reiterate that this case presents no important and unsettled question of federal law, and that the decision below not only is not in conflict with, but rather is a direct lineal descendant of, the decisions of other courts of appeals. Two decisions of the Fourth Circuit [5] have, after careful consideration, affirmed the FCC's jurisdiction over facilities which are used in both interstate and intrastate communications. The same conclusion has been reached by the First Circuit [6] and by the only state court which has squarely considered the issue.[7] The decision below is also entirely consistent with the decision of the Third Circuit affirming the FCC's requirement that the established carriers must provide interconnection of FX and CCSA facilities.[8]

This Court has denied certiorari in both Fourth Circuit cases.[9] Petitioners have failed to adduce any meaningful distinction between this case and those

[5] North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 46 U.S.L.W. 3190 (Oct. 3, 1977) (North Carolina II); North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (North Carolina I).

[6] Puerto Rico Telephone Co. v. FCC, 553 F.2d 694 (1st Cir. 1977).

[7] Sherdon v. Dann, 193 Neb. 768, 229 N.W.2d 531 (1975).

[8] Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[9] *North Carolina I* and *II*, *supra* note 5.

and have failed to suggest any change in circumstances which make certiorari more appropriate now.

CONCLUSION

For the above reasons, certiorari should be denied.

Respectfully submitted,

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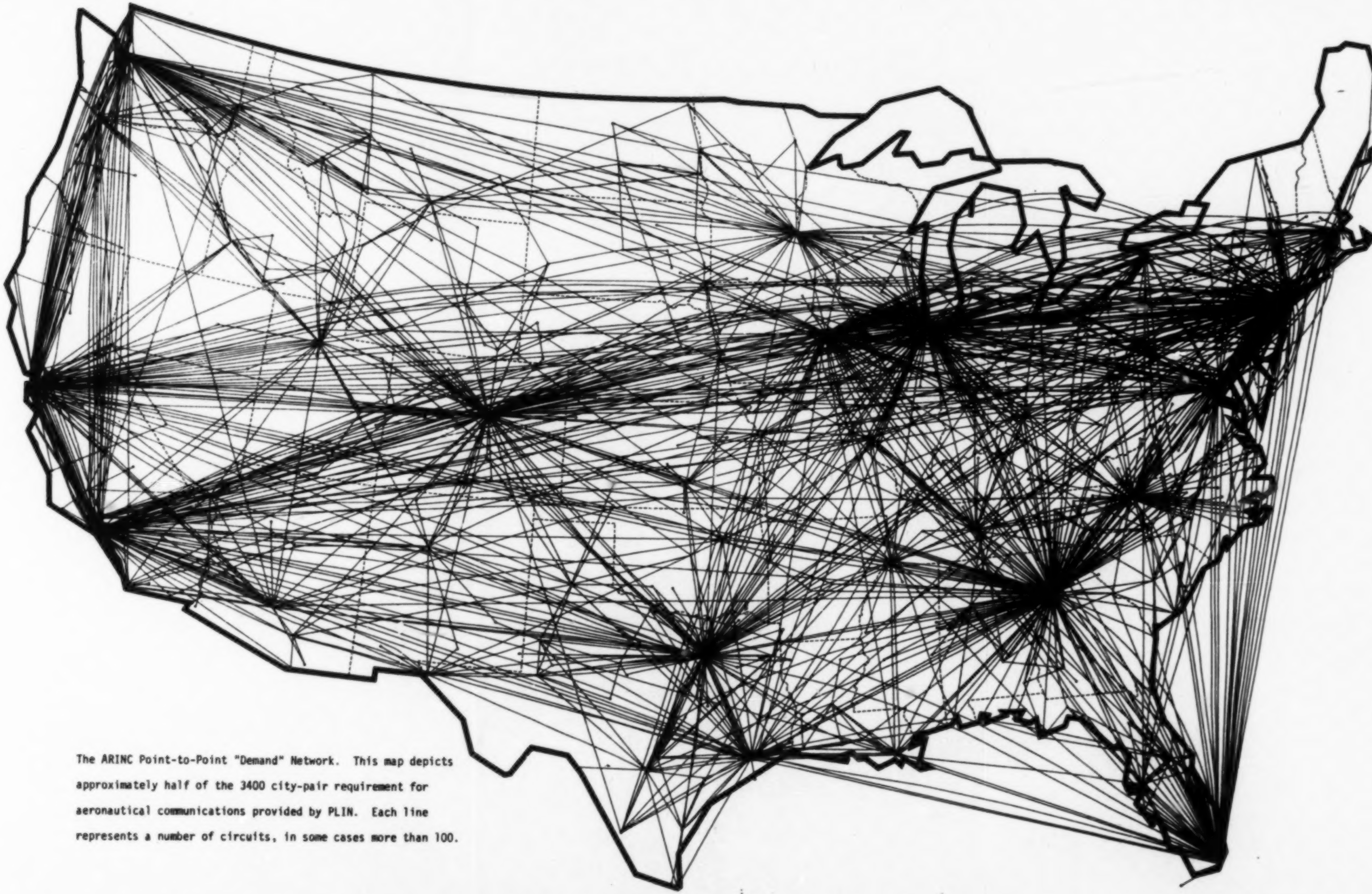
November 7, 1977

ADDENDUM



The ARINC Point-to-Point "Demand" Network. This map depicts approximately half of the 3400 city-pair requirement for aeronautical communications provided by PLIN. Each line represents a number of circuits, in some cases more than 100.

Nos. 77-406 and 77-434

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15)[1] is not yet reported. The opinion and order of the Federal Communications Commission (Pet. App. 16-44) is reported at 56 FCC 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1977. The petition for a writ of certiorari in No.

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[1]"Pet. App." refers to the separately bound joint appendix.

77-406 was filed on September 15, 1977, and the petition in No. 77-434 was filed on September 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly concluded that States may not adopt rules or issue orders that would interfere with the provision of interstate communications services by communications common carriers as part of an integrated interstate communications network.

STATEMENT

This case arises out of the efforts of the Southern Pacific Communications Co., an interstate communications common carrier licensed by the Federal Communications Commission, to extend an existing interstate line from Los Angeles to San Diego.

In 1971 the Commission adopted a general policy favoring the entry of new common carriers into the business of providing specialized interstate communications service, for which the public had previously been dependent mainly on the American Telephone & Telegraph Company ("AT&T"). *Specialized Common Carrier Services,* 29 FCC 2d 870, affirmed on reconsideration, 31 FCC 2d 2206, affirmed *sub nom. Washington Utilities & Transportation Commission* v. *Federal Communications Commission,* 513 F. 2d 1142 (C.A. 9), certiorari denied *sub nom. National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission,* 423 U.S. 836. The Commission also concluded then that the new carriers should be permitted to connect with established carriers on a nondiscriminatory basis, in order to provide the intercity and local distribution facilities needed by the new carriers to complete their service offerings. *Ibid.*

AT&T and its subsidiaries resisted this decision. In 1973 the Commission ordered them to afford to the new interstate carriers all necessary local exchange interconnection facilities. *Bell System Tariff Offerings,* 46 FCC 2d 413, affirmed *sub nom. Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission,* 503 F. 2d 1250 (C.A. 3), certiorari denied *sub nom. American Telephone & Telegraph Co.* v. *Federal Communications Commission,* 422 U.S. 1026. The Commission held there that AT&T and its local operating companies must file with it, rather than with state regulatory commissions, tariffs to cover the offering of interconnection facilities for the competing specialized carriers. 46 FCC 2d at 437.

Southern Pacific is one of the new specialized interstate carriers licensed by the Commission. Southern Pacific operates a private, national communications network for American Airlines (Pet. App. 21). One line of the network terminated in Los Angeles, and in 1975 Southern Pacific sought to extend this line from Los Angeles to San Diego. In order to provide the same service provided to callers elsewhere on the system, Southern Pacific needed to be able to connect its line with local telephone company distribution facilities. The Pacific Telephone & Telegraph Company ("Pacific"), an AT&T operating company, initially refused to provide the requested connection, claiming that the facilities were intrastate and thus within the jurisdiction of the California Public Utilities Commission rather than federal jurisdiction.[2] Pacific subsequently

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[2]Although Southern Pacific also had state authority for intrastate private line service, the California Commission forbade the connection of Southern Pacific's lines with local exchange facilities necessary to provide foreign exchange service (Pet. App. 45-124). This case does not present any question concerning interconnection with Southern Pacific's intrastate private lines.

provided the requested connection under protest, while asking the California Commission for an order requiring Southern Pacific to desist. Southern Pacific then sought clarification from the Federal Communications Commission, petitioning for a declaratory ruling with respect to the scope of federal jurisdiction.

The Commission found that the physical location of the line was within California, but that it is "an integral part of a dedicated interstate communications network" used by American Airlines (Pet. App. 32). It ruled that the line was part of an interstate communications network, and the fact that some of the communications on the line overwhelmingly used for interstate traffic[3] would both begin and end in California was not enough to allow state authorities to forbid interconnection— a prohibition that would bar the interstate service as well as the intrastate service (*id.* at 30-32). The Commission found that California's policy of barring local interconnection of this line frustrated the federal policy (*id.* at 28-30), and it held that Pacific must provide the requested interconnection (*id.* at 33).

A divided court of appeals affirmed the Commission's order (Pet. App. 1-15). Finding the only "substantial issue" raised on appeal to be "whether the Commission possesses statutory authority to regulate the facilities in question" (Pet. App. 4), the court concluded that the Commission had not exceeded its authority. The court agreed with the Commission's determination that it could regulate facilities used in both interstate and intrastate

[3]It is undisputed that 82 percent of the calls over the line would be interstate (Pet. App. 21).

communications when it is "technically and practically difficult" to separate the two types of communications (Pet. App. 4-5).[4]

The court held that the Commission reasonably had concluded that it was impractical to attempt to separate the interstate and intrastate communications on this facility because to do so would require " 'the customer to maintain two redundant facilities or to invest in expensive additional equipment' [which] would frustrate the Commission's responsibility 'to make available, so far as possible to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges' " (Pet. App. 6, quoting from Pet. App. 28).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or of another court of appeals, and does not warrant further review.

1. Petitioners and Pacific argue that, because of the reservation of state power in Sections 2(b) and 221(b) of the Communications Act of 1934, 48 Stat. 1065, 1080, as amended, 47 U.S.C. 152(b) and 221(b), the Commission may not regulate carrier facilities used for interstate communication if they are also used for intrastate communication.[5] This argument is incorrect. It has been

[4]The court pointed out that the Commission had refused to assert jurisdiction over local exchange service "that could be practically separated from inter-state services supplied through the same facilities" (Pet. App. 5).

[5]Although petitioners in No. 77-406 speak of "purely intrastate communications services" (Pet. 14), it is not disputed that the facility in question is used mainly for interstate communication (Pet. App. 21). The Commission made it clear that it has no intention of regulating facilities used exclusively for intrastate calls (Pet. App. 5-6, 33).

rejected three times by other courts of appeals, and this Court has declined to review two of those decisions. *North Carolina Utilities Commission* v. *Federal Communications Commission* (*NCUC I*), 537 F. 2d 787 (C.A. 4), certiorari denied, 429 U.S. 1027; *North Carolina Utilities Commission* v. *Federal Communications Commission* (*NCUC II*), 552 F. 2d 1036 (C.A. 4), certiorari denied, October 3, 1977 (No. 76-1675); *Puerto Rico Telephone Co.* v. *Federal Communications Commission*, 553 F. 2d 694 (C.A. 1).[6]

Review should be denied here for the reasons discussed in our brief in opposition in *NCUC II*.[7] The fact that *NCUC I* and *NCUC II* involved terminal equipment attached to the lines, while this case involves attaching an interstate line to local lines, is not material. Sections 2(b) and 221(b) refer to "facilities" without distinction, and, as the court of appeals recognized, the *NCUC* cases "succinctly articulated the principles that govern this case as well" (Pet. App. 6).

2. Petitioners also contend that the Commission should not have resolved, without an evidentiary hearing, the essentially factual question whether it was technically and practically difficult to separate the interstate and intrastate communications on this facility. This question, which involves no unsettled legal principle, does not require review here. Moreover, the Commission did not err. The Commission concluded not only that it would be technically difficult to separate interstate from intrastate messages but also that, in order to surmount this difficulty and subject intrastate communications to state regulation, customers of interstate specialized carriers

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[6]Accord, *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W. 2d 531.

[7]We have furnished copies of that brief to counsel in this case.

would be required "to maintain two redundant facilities or to invest in expensive additional equipment" (Pet. App. 28). Petitioners do not dispute the fact that at least the latter of the Commission's assessments is correct. There was, consequently, no need for an evidentiary hearing.[8] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. Cf. *Codd* v. *Velger*, 429 U.S. 624.

The Commission's conclusion that California's prohibition of interconnection would impermissibly burden interstate communications is, as the court of appeals held, reasonable (Pet. App. 6). Having properly found that California's policy is inconsistent with federal policy, the Commission resolved the federal-state conflict in favor of federal supremacy. This result is correct, for a valid federal regulatory program prevails over inconsistent state law. *Hines* v. *Davidowitz*, 312 U.S. 52; *Farmers Union* v. *WDAY*, 360 U.S. 525.

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[8]Similar arguments about the need for a hearing were raised by petitioners in *NCUC I* and *NCUC II*. In those cases, too, it would have been technically feasible to separate the interstate and intrastate aspects of the service. In both cases, however, the result would have been the same: wasteful duplication of facilities and ultimate frustration of the Commission's statutory mandate. No evidentiary hearing was necessary in *NCUC I* and *NCUC II* to demonstrate this obvious fact, as none was necessary here. See *NCUC I*, *supra*, 537 F. 2d at 791-792; *NCUC II*, *supra*, 552 F. 2d at 1043.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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